COURT OF APPEAL FOR ONTARIO

CITATION: Arora v. Whirlpool Canada LP, 2013 ONCA 657
DATE: 20131031
DOCKET: C56224 & C56006

Hoy A.C.J.O., Feldman and Simmons JJ.A.

BETWEEN

Vijay Arora, Stacey Jacobs and Kathleen Oliver

Plaintiffs (Appellants)

and

Whirlpool Canada LP and Whirlpool Corporation

Defendants (Respondents)

Harvin D. Pitch and Adam Brunswick, for the appellants

S. Gordon McKee, Timothy Buckley and Cheryl M. Woodin, for the respondents

Heard: July 2, 2013

On appeal from the orders of Justice Paul M. Perell of the Superior Court of Justice dated August 16, 2012, with reasons reported at 2012 ONSC 4642, 94 C.C.L.T. (3d) 215 and October 11, 2012.

Hoy A.C.J.O.:

[1] The appellants sought to certify a class action against Whirlpool Canada LP and Whirlpool Corporation ("Whirlpool"), alleging that their front-loading washing machines were poorly designed and prone to developing an unpleasant smell. They claimed damages for breach of express and implied warranty,

breach of the *Competition Act*, R.S.C. 1985, c. C-34, negligence, and waiver of tort. The motion judge refused certification, concluding that none of the claims disclosed a cause of action. These appeals arise from that decision.

A. OVERVIEW

[2] In 2001, Whirlpool began manufacturing front-loading clothes washing machines. Before this, Whirlpool had only manufactured the top-loading washing machines conventionally used in North America. The front-loading machines had significant advantages: they were more energy- and water-efficient and gentler on clothing than top-loading machines. However, they did not self-clean as well as top-loading machines.

[3] By September 2003, Whirlpool began receiving some complaints about odour, mould or mildew.

[4] Whirlpool undertook efforts to improve its design: between 2001 and 2008, it manufactured 14 successive models of its front-loading machines, incorporating various features intended to improve the machines' ability to self-clean. While from the outset, Whirlpool's User and Care Guides recommended the use of high efficiency ("HE") detergents and provided cleaning instructions for the washer door, it modified its User and Care Guides to emphasize that only HE detergents should be used, to direct owners to clean the inside of the machines on a periodic basis, and to provide troubleshooting tips for odour problems. In

September of 2007, it also began selling a cleaner in tablet form, called “Affresh”, to be used in the cleaning cycle to alleviate washer residue and odour.

[5] In 2010, the appellants, Vijay Arora, Stacey Jacobs and Kathleen Oliver, launched this proposed class action on behalf of a class comprised of persons in Canada (other than Quebec) who own or previously owned a 2001 through 2008 model of a Whirlpool front-loading washing machine. They elected to sue Whirlpool, and not the retailers from which they purchased the machines.[1] They allege that all these models suffer from common design defects that fail to prevent or adequately eliminate a buildup inside the machine of soap, softener, dirt and debris and to provide air circulation to allow the interior surfaces of the machine to dry once a wash has ended. This in turn is alleged to have resulted in the growth of mould, mildew, fungi and bacteria – referred to in the litigation as “biofilm” – and a musty or mouldy smell being imparted on clothes washed in the machine, the machine itself, and in the laundry room.

[6] The appellants do not allege that the front-loading machines are dangerous or allege injury to their health.[2] The appellants pleaded that they have incurred repair costs, but pleaded no particulars. Two of the three appellants pleaded their clothing was damaged by the smell imparted on them and that they

---

[1] Whirlpool does not sell its washing machines directly to consumers. It does sell machines to its employees, but the plaintiffs acknowledged during the oral argument on the certification motion that they should be excluded from the proposed class.

[2] They abandoned the claim in their Amended Amended Amended Statement of Claim that the machines posed a real and substantial danger to the health and safety of the appellants and the proposed class.

incurred out-of-pocket expenses as a result, but pleaded no particulars and do not claim the expenses allegedly incurred or damaged clothing as a head of damages. While none of the appellants pleaded that he or she purchased Affresh, there was evidence that one of the appellants (Ms. Jacobs) did so, and the appellants also claim the cost of Affresh or similar cleaning tablets.

[7] It is conceded both that not all class members have sustained damage to their clothing, and that repair costs would be an individual issue.

[8] The heart of the appellants' claim, therefore, is that the machines purchased were shoddy goods that were not worth their purchase price. They seek what they style as damages for the overpayment – a form of rebate, or "diminution in value".

[9] The appellants advanced several claims: breach of express warranty; breach of implied warranty; breach of s. 52 of the *Competition Act*; negligence; and waiver of tort. Jurisprudentially, the most significant of their claims is in negligence for pure economic loss for negligent design against a manufacturer of a non-dangerous consumer product.

[10] On the motion for certification, the motion judge concluded that the pleadings did not disclose a cause of action. Moreover, he concluded that if he were wrong in determining that the appellants' claim in negligence was not tenable, a class action was in any event not the preferable procedure for the

resolution of their negligence claim. In two orders, the motion judge dismissed the certification motion and dismissed the appellants' action against Whirlpool.[3]

[11] On appeal, the appellants argue that the motion judge erred in concluding that the pleadings did not disclose a cause of action and that a class proceeding was not the preferable procedure for resolution of the negligence claim. I conclude that the motion judge did not err in determining that the pleadings do not disclose a cause of action, and would accordingly dismiss these appeals without the need to address the appellants' arguments on the issue of preferable procedure.

[12] Below, I address each of the pleaded claims in turn. However, I first briefly set out the approach that must be taken in determining whether the pleadings disclose a cause of action.

B. NO REASONABLE PROSPECT OF SUCCESS

[13] A proceeding will not be certified as a class proceeding if the pleadings do not disclose a cause of action: see s. 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

---

[3] Pursuant to ss. 6(2) and (3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, Sharpe J.A. ordered that the appeal to the Divisional Court of the motion judge's dismissal of the appellants' certification motion be heard by this court, together with the appeal to this court of the motion judge's order dismissing the appellants' action. He observed that the issue raised on both appeals is the same. I note that the motion judge dismissed all claims of all proposed representative plaintiffs.

[14] Certification is to be denied on the basis that the requirement of s. 5(1)(a) is not met only "if, assuming the facts pleaded are true, it is plain and obvious that the pleading discloses no reasonable cause of action, meaning that the plaintiff has no reasonable prospect of success": *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161, at para. 22, citing *Hunt v. Carey*, [1990] 2 S.C.R. 959*,* at p. 980; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17-19; *Wellington v. Ontario*, 2011 ONCA 274, 105 O.R. (3d) 81, at para. 14, leave to appeal refused, [2011] S.C.C.A. No. 258.

[15] In *Imperial Tobacco*, at paras. 19-21 and 25, McLachlin C.J. explained the delicate balance to be applied in determining if a claim has no reasonable chance of success:

> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> This promotes two goods – efficiency in the conduct of the litigation and correct results.
>
> …
>
> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed…. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

…

> The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way – in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered *in the context of the law and litigation process*, the claim has no reasonable chance of succeeding. [Emphasis in original.]

[16] I keep this in mind in considering each of the claims pleaded by the appellants.

C. BREACH OF EXPRESS WARRANTY

[17] Whirlpool provided three different forms of warranty during the period 2001-2008. Each warranty was limited to one year from the date of purchase and applicable only if the washer was operated and maintained according to instructions attached to or furnished with the product.

[18] The first, in effect from 2001-2006, provided that "Whirlpool Corporation will pay for FSP replacement parts and repair labor costs to correct defects in materials or workmanship."

[19] The second, in effect from 2006-2008, similarly provided that Whirlpool "will pay for Factory Specified Parts and repair labor to correct defects in

materials or workmanship". In addition, that warranty went on to provide that the "Customer's sole and exclusive remedy under this limited warranty shall be product repair as provided herein", and that Whirlpool was not liable for incidental or consequential damages.

[20] The third warranty, in effect from 2007-2008, is the same in all respects material to a consideration of the appellants' express warranty claim as the second warranty.

[21] At para. 181 of his reasons, the motion judge wrote:

> The Plaintiffs do not sue to correct defects in materials or workmanship. They sue because they allege that the Whirlpool machines have a defective design. As a matter of contract interpretation, it is plain and obvious to me that their claim is not covered by the express warranty, that their claim is exculpated by the disclaimer language in the warranty, and there is no overriding public policy reasons (as there might be for a dangerous product) for not enforcing the express terms of the Whirlpool warranty.

[22] The appellants do not argue that the motion judge erred in considering the wording of the express warranties that they pleaded Whirlpool breached in determining whether they had a tenable claim for breach of express warranty. They argue that it is not plain and obvious that their claims are not covered by the express warranties, and that the interpretation of the express warranties should be conducted at trial, on a full record.

[23] I do not agree. In my view, the motion judge correctly concluded that it is plain and obvious that the express warranties provided by Whirlpool do not cover the claims advanced by the appellants. As the motion judge noted, the appellants did not sue to correct defects in materials or workmanship. They sued alleging defective design.

[24] The appellants also argue that the motion judge failed to consider that the warranties are analogous to contracts of adhesion, and to apply the principle of *contra preferentum*. This is indeed a situation in which the principle of *contra preferentum*, i.e., any ambiguity should be decided against the party that drafted the contract, would apply. However, this principle cannot assist the appellants, because there is no ambiguity in the language of the warranty. See e.g. *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada*, 2008 SCC 66, [2008] 3 S.C.R. 453, at para. 33; *Maher v. Great Atlantic & Pacific Co. of Canada*, 2010 ONCA 415, 266 O.A.C. 173, at para. 51. I also note that two of the appellants pleaded that their machines were purchased in 2004, and the third appellant pleaded that she purchased her machine in 2007. In each case, the claims on the express warranties were made more than a year after purchase.

D. BREACH OF IMPLIED WARRANTY

The issue

[25] The appellants argue that, in dismissing their claim for breach of implied warranty, the motion judge failed to consider their pleaded claim that Whirlpool breached the condition that they argue is implied by s. 15 of the *Sale of Goods Act*, R.S.O. 1990 c. S.1 (the "SGA") or the equivalent in other provinces, namely that the front-load washing machines they purchased would be "reasonably fit" for the purpose of washing clothing. A washing machine is not reasonably fit for the purpose of washing clothing when it imparts an unpleasant odour on the clothing washed.

[26] The relevant provisions of the SGA are as follows:

> 1(1) In this Act,
>
> "buyer" means the person who buys or agrees to buy goods;
>
> "contract of sale" includes an agreement to sell as well as a sale;
>
> …
>
> "sale" includes a bargain and sale as well as a sale and delivery;
>
> "seller" means a person who sells or agrees to sell goods;
>
> …

15 Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.

3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

[27] With the exception of Saskatchewan and New Brunswick, the provisions of the sale of goods legislation in the other provinces whose residents are included in the proposed class[4] are the same in all material respects.

The parties' submissions

[28] Whirlpool argues that it is plain and obvious that s. 15 of the SGA does not apply because it is not a "seller" within the meaning of the SGA vis-à-vis the appellants. It relies on the wording of the SGA and *Mann-Tattersall (Litigation guardian of) v. Hamilton (City)* (2000), 38 C.L.R. (3d) 255 (Ont. Sup. Ct.). In *Mann-Tattersall*, at para. 31, the court held that "[a] party cannot advance a claim for breach of any of the implied warranties provided for in the [SGA] against a party with whom it has no privity of contract."

[29] In response, the appellants point to *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.), at paras. 22 and 23, which was decided after *Mann-Tattersall*. *Caputo* was a certification motion for a proposed class action seeking damages for personal injuries caused by the use of cigarettes. The numerous causes of action pleaded included breach of implied warranty. While the SGA was not specifically pleaded, the tobacco manufacturers relied on it, as well as *Dunlop Pneumatic Tyre Co. v. Selfridge & Co. Ltd.*, [1915] A.C. 847

---

[4] While the Amended Amended Amended Statement of Claim defines the class as including persons resident anywhere in Canada who owned or previously owned a 2001-2008 Whirlpool front-loading washer, at para. 2 of his reasons the motion judge notes that Quebec residents are excluded from the class and that a companion action in British Columbia is on hold.

(H.L.), and *Mann-Tattersall*, to argue at para. 20 that where (as here) "a retailer sells goods to the ultimate consumer, the consumer cannot sue the manufacturer on implied warranties."

[30] In *Caputo*, Winkler J. (as he then was) referred to *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, which established a two-part test to determine when a new exception should be made to the law regarding privity of contract. He concluded that, in light of *Fraser River*, it was not plain and obvious that the plaintiffs could not succeed in establishing that an exception to the doctrine of privity of contract might apply in the circumstances of that case.

Analysis

[31] The fact that Whirlpool did not sell the machines directly to consumers is critical to the viability of the appellants' implied warranty claim.

[32] It is clear that individuals resident in Saskatchewan and New Brunswick could have a cause of action against Whirlpool for breach of the warranty of fitness for purpose implied under the sale of goods legislation in those provinces. In Saskatchewan and New Brunswick, legislation expressly provides that lack of privity does not defeat a third party's claim for damages as a result of a breach of an implied warranty: see *Consumer Protection Act*, S.S. 1996, c. C-30.1, at s. 55; *Law Reform Act*, R.S.N.B. 2011, c. 184, at s. 4(1). Accordingly, subject to certain

requirements, a consumer in those provinces can claim directly against a manufacturer if a product fails to conform to the implied warranties of fitness and quality. The appellants, however, are all resident in Ontario and therefore cannot.

[33] I agree with the motion judge that the appellants' claim against Whirlpool for breach of the warranty of fitness for purpose implied under the SGA has no reasonable prospect of success. Their remedy under the SGA is against the seller, and in this case Whirlpool was not the seller.

[34] In my view, *Fraser River* does not assist the appellants.

[35] The two-part test in *Fraser River*, at para. 32, referred to in *Caputo*, at para. 22, is as follows:

> - Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and
> - Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

[36] The appellants pleaded as follows with respect to the SGA:

> 31A. Further, the defendants were subject to an express warranty and/or implied warranty at common law or under the *Sale of Goods Act*, R.S.O. 1990, c. S.1 (or equivalent in other provinces) to supply the Whirlpool Front-loaders free from material defects and fit for their intended use.

…

> 38A.The defendants breached their express or implied warranty (pleaded in para. 31A) when they supplied the Whirlpool front-loaders because, as pleaded above, these machines were not free from material defects or fit for their intended use.

[37] On my reading, the appellants assert a direct, implied warranty from Whirlpool to the appellants. To possibly fit within *Fraser River*, the appellants must plead that the contracts between Whirlpool and its many retailers included the implied condition that the appellants seek to rely on, and that Whirlpool and the retailers intended to extend the benefit of that implied warranty to class members who purchased machines from those retailers. They have not done so, and it cannot be assumed that the contracts between Whirlpool and its retailers include such an implied condition. Section 53 of the SGA provides that the parties may contract out of such a term, expressly or otherwise. As pleaded, *Fraser River* does not assist the appellants.

[38] Moreover, even if there were such an implied condition between Whirlpool and the retailers, the appellants' SGA claim cannot succeed as it relates to class members such as the representative plaintiff Ms. Jacobs, who did not buy her washing machine from a retailer but rather acquired it from its original owner when she purchased a new house.

[39] While not argued, I also note that *Fraser River* recognizes an exception to the doctrine of privity of contract to *protect* a party from liability, not to permit a

party to sue. Thus that case does not establish the particular exception to privity that the appellants would require. While *Fraser River* and its predecessor*, London Drugs Ltd. v. Kuhne & Nagel Ltd.*, [1992] 3 S.C.R. 299, do allow for additional exceptions to be recognized in certain circumstances, those exceptions must be incremental: see *Fraser River*, at para. 43-44; *Brown v. Belleville (City)*, 2013 ONCA 148, 114 O.R. (3d) 561, at para. 97.

[40] Had the appellants pleaded that the contracts between Whirlpool and the retailers included the implied condition on which they seek to rely, and that Whirlpool and the retailers intended to extend the benefit of that provision to the appellants, they would also have to establish that allowing the third party appellants to sue under those contracts would be an incremental change to the doctrine of privity.

[41] In *Vandewal v. Vandewal*, [2002] O.J. No. 393 (S.C.), Robertson J. would have allowed such a claim, and that decision and the reasons were upheld by this court: 2003 CanLII 1002 (ON CA). However, that part of the trial judge's reasons was clearly *obiter*. The B.C. Court of Appeal has concluded that such an extension of privity is a "monumental change" that goes "well beyond anything contemplated" by *London Drugs* or *Fraser River*: see *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 75, 265 D.L.R. (4th) 462, at paras. 70-71; *Holmes v. United Furniture Warehouse Limited Partnership*, 2012 BCCA 227, at paras. 21-22.

[42] As I have concluded that, as pleaded, *Fraser River* does not apply, it is unnecessary for me to decide whether I would endorse the B.C. Court of Appeal's conclusion in *Holmes*, and it is preferable that such a determination await a case where argument is squarely focussed on that issue. It is also unnecessary for me to address the question of whether the warranties the appellants allege were implied were, in fact, disclaimed by the language of the express warranties.

E. BREACH OF THE *COMPETITION ACT*

The statutory framework

[43] Subsection 52(1), which is in Part VI of the *Competition Act*, provides as follows:

> 52(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

[44] Subsection 36(1) creates a statutory cause of action for any person who has suffered loss or damages for breach of s. 52(1):

> 36(1) Any person who has suffered loss or damage as a result of
>
> conduct that is contrary to any provision of Part VI, or
>
> the failure of any person to comply with an order of the Tribunal or another court under this Act,

> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

The motion judge's analysis

[45] The motion judge noted that the appellants did not plead a common express representation. They rely on a representation by omission – essentially that Whirlpool did not tell them that the front-loading washing machines they were buying did not self-clean in the same way as top-loading washing machines and were susceptible to the buildup of biofilm, resulting in unpleasant odours, and that moreover the machines had design defects that exacerbated this susceptibility.

[46] At paras. 194-195, the motion judge acknowledged that "in some circumstances silence may constitute a misrepresentation", but noted that "as a general rule, however, silence is not a representation, unless there is a duty of care, a statutory duty to disclose, or a fiduciary duty to speak". He concluded, at para. 197:

> [S]ince the alleged design defect in the washing machines did not make the machines dangerous, it is plain and obvious that Whirlpool was not under an obligation to disparage its own product and disclose the alleged design defect. In my opinion, it had no duty of care to disclose, no fiduciary duty to disclose, and no

> statutory duty to disclose. It was entitled to remain silent, and in my opinion, it is plain and obvious that it did not commit an offence under s. 52 of the *Competition Act*.

[47] Among the authorities he referred to, the motion judge cited, and agreed with, *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, [2011] O.J. No. 5049, (aff'd on other grounds 2012 ONSC 3692, 34 C.P.C. (7th) 403 (Div. Ct.)).[5] In *Williams*, the court held that there was no violation of s. 52 of the *Competition Act* because s. 52 requires that there be a "representation", and the failure to disclose cannot be a "representation".

The parties' submissions

[48] The appellants rely on *Spinks v. Canada (C.A.)*, [1996] 2 F.C. 563, at para. 30, and *Knight v. Imperial Tobacco Canada Ltd.*, 2005 BCSC 172, 250 D.L.R. (4th) 347, rev'd in part by 2006 BCCA 235, 267 D.L.R. (4th) 579, to argue that failure to divulge important information can constitute a misrepresentation, and the motion judge accordingly erred in concluding that it was plain and obvious that, in this case, a claim under s. 52 of the *Competition Act* could not succeed.

[49] Whirlpool does not dispute the principle that misrepresentation by omission may be actionable. It submits that an allegation of omission in the context of no

---

[5] The Divisional Court found it unnecessary to consider the issue of whether the pleadings disclosed a cause of action, including a cause of action under s. 52 of the *Competition Act*.

representations which could convert an omission into a misrepresentation by implication does not form the basis of a tenable claim.

Analysis

[50] I agree that where, as here, there is no common express representation pleaded which could convert an omission into a misrepresentation by implication, and there is no duty to disclose, it is plain and obvious that a claim for breach of s. 52 cannot succeed. Section 52 of the *Competition Act* does prohibit "material" false or misleading representations. However, unlike statutes such as provincial securities legislation, which require the provision of "full, true and plain disclosure of all material facts" (see e.g. *Securities Act*, R.S.O. 1990, c. S-5, s. 56(1)), the *Competition Act* does not impose a general duty of disclosure.

[51] I would note and adopt the holding in *Williams v. Canon*, at para. 227, that "the failure to disclose the alleged defect cannot be a 'representation'" for the purpose of s. 52. The appellants argue that this analysis by Strathy J. (as he then was) was both *obiter* and incorrect. However, the authority they cite (Allen Linden & Bruce Feldthusen, *Canadian Tort Law*, 9th ed. (Markham, LexisNexis: 2011), at p. 470) does not support them; it deals with misrepresentations in negligence as opposed to under the *Competition Act*, and merely recognizes what Whirlpool concedes, namely that in some circumstances omissions can constitute

misrepresentations. *Spinks* and *Knight* merely recognize the same undisputed principle. If *obiter*, Strathy J.'s conclusion is in any event persuasive.

F. CLAIM FOR ECONOMIC LOSS FOR NEGLIGENT DESIGN OF A NON-DANGEROUS CONSUMER PRODUCT

A framework

[52] As Professor Feldthusen explains, "[a] *pure* economic loss is a financial loss which is not causally consequent upon physical injury to the plaintiff's *own* person or property" (emphasis in original): Bruce Feldthusen, *Economic Negligence*, 6th ed. (Toronto: Carswell, 2012), at p. 1. To date, Canadian courts have limited tort recovery for economic loss absent physical harm or damage to property.

[53] In *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, at para. 37, the Supreme Court explained why:

> [I]t has been recognized that in limited circumstances damages for economic loss absent physical or proprietary harm may be recovered. The circumstances in which such damages have been awarded to date are few. To a large extent, this caution derives from the same policy rationale that supported the traditional approach not to recognize the claim at all. First, economic interests are viewed as less compelling of protection than bodily security or proprietary interests. Second, an unbridled recognition of economic loss raises the spectre of indeterminate liability. Third, economic losses often arise in a commercial context where they are often an inherent business risk best guarded against by the party on whom they fall through

> such means as insurance. Finally, allowing the recovery of economic loss through tort has been seen to encourage a multiplicity of inappropriate lawsuits. [Citations omitted.]

[54] A negligence claim, including one for economic loss, cannot succeed unless there is a duty of care. If the relationship does not fall into a settled category that gives rise to such a duty, the relationship must pass the two-stage "*Anns* test", developed in Canadian case law from *Anns v Merton London Borough Council*, [1978] A.C. 728 (H.L.):

> (1) Is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the defendant, carelessness on its part might cause loss or harm to the plaintiff?
>
> (2) If so, are there any residual policy considerations that should negate or limit the scope of the *prima facie* duty of care, the class of persons to whom it is owed or the damage to which a breach of it might give rise?

See *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 O.R. (3d) 433, at para. 21, leave to appeal refused, [2002] S.C.C.A. No. 446; *Imperial Tobacco*, at para. 39; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 20.

[55] Different types of factual situations raise different policy issues. Five descriptive categories of economic loss cases involving different policy considerations have been identified:

(1) the independent liability of statutory public authorities;

(2) negligent misrepresentation;

(3) negligent performance of a service;

(4) negligent supply of shoddy goods or structures; and

(5) relational economic loss.

See *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1049; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, at para. 12. These categories are drawn from Professor Feldthusen's article, "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1991) 17 Can. Bus. L.J. 356, at pp. 357-358.

[56] The appellants' claim in this case falls into the fourth category: negligent supply of shoddy goods or structures.

[57] As Professor Feldthusen explains in *Economic Negligence* at pp. 16, 17, 22, 23 and 26, the purpose of the categories is to assist in the stage two policy analysis. Generally, different policy arguments are relevant, or of a different degree of importance, in one category than another. The categorization seeks to focus the policy analysis, and avoid a case-by-case approach, which risks inconsistent results. The categories will evolve as the jurisprudence evolves.

[58] In *Winnipeg Condominium*, the Supreme Court considered whether there were policy reasons to negate a duty of care in a case that involved a shoddy

structure. The building at issue, a condominium, was not only shoddy, but dangerous. La Forest J., writing for a unanimous court, distinguished, on a policy level, between “dangerous” and “shoddy” defects. He concluded, at para. 12, that “compelling policy reasons exist for the imposition upon contractors of tortious liability for the cost of repair of these [dangerous] defects.”

[59] Crucially for our purposes, La Forest J. expressly declined to consider whether a similar duty should be recognized when the defect is not dangerous. He stated, at para. 41:

> Given the clear presence of a real and substantial danger in this case, I do not find it necessary to consider whether contractors should also in principle be held to owe a duty to subsequent purchasers for the cost of repairing non-dangerous defects in buildings…. I would require argument more squarely focused on the issue before entertaining this possibility.

The washing machines in this case are alleged to be shoddy, but not dangerous.

The motion judge’s reasons

[60] The motion judge’s analysis is detailed.

[61] In brief, the motion judge interpreted *Winnipeg Condominium* and subsequent authorities as settling that there is no product-liability negligence action for pure economic loss against a manufacturer for negligently designing a non-dangerous consumer product. He accordingly concluded that it was plain and obvious that the appellants’ negligence claim could not succeed.

[62] The motion judge then went on to consider whether, if he were wrong in concluding that *Winnipeg Condominium* had settled the issue, it was nonetheless plain and obvious from the application of the two-stage *Anns* test that the appellants' negligence claim could not succeed. The motion judge determined that, assuming that the relationship between the appellants and Whirlpool was sufficient to give rise to a *prima facie* duty of care, and the appellants' claim therefore survived the first stage of the test, there were overriding policy considerations that negated that duty of care. It was therefore plain and obvious that the appellants' claim could not survive the second stage of the test and a duty of care could not be found to exist.

[63] Citing *Martel Building*, the motion judge relied on what he described, at para. 280, as "the traditional factors that justified the traditional rule that pure economic losses are not recoverable in negligence."

[64] At para. 281, the motion judge acknowledged "that the spectre of indeterminate liability, a commonly mentioned policy reason for negating a duty of care with respect to pure economic losses, is not a factor in the case at bar." The members of the class economically harmed could be identified and their losses were not unbounded.

[65] At para. 288, he set out his view of the underlying policy theme of *Martel Building*: "[C]ompensation for economic losses are best regulated by contract

and property law and … there must be some countervailing policy to justify tort law regulating an economic activity."

[66] The motion judge concluded, at para. 289:

> In the context of the case at bar, the same negating policy themes identified by the court in *Martel Building* apply and indicate that the Plaintiffs should be left to their contractual remedies including express, implied, or statutory warranties and they should not look to tort law to negotiate a better bargain for themselves.

The appellants' submissions

[67] The appellants make four main arguments.

[68] First, they say that the motion judge failed to appreciate the nature of the damages suffered. He did not consider that two of the three appellants pleaded damage to clothing – a musty or mouldy smell imparted on clothes washed in the machines – and resultant out-of-pocket expenses. Therefore, they submit, the motion judge mischaracterized their claim in negligence as one for pure economic loss, as opposed to one arising from damage to property. Similarly, they submit that the cost claimed of buying the Affresh tablets manufactured by Whirlpool or similar cleaning tablets for use in cleaning the machines are mitigation damages, to prevent further damage to property (the clothes washed in the machines), and not pure economic loss.

[69] Second, the appellants submit that the motion judge erred in concluding that *Winnipeg Condominium* decided the question of whether a manufacturer is

liable in tort for pure economic loss arising from a defective, non-dangerous consumer product. They submit that this remains an open question in Canadian tort law.

[70] Third, the appellants say the motion judge should not have undertaken the policy analysis required to decide the duty of care issue without the benefit of a full factual record.

[71] Finally, the appellants submit that the motion judge erred in concluding that their negligence claim had no reasonable prospect of success.

Analysis

[72] I deal with each of the appellants' arguments in turn.

(1) The appellants do not have a claim for damage to property

[73] In my view, the motion judge did not err in concluding that the appellants' claim was not one for damage to property.

[74] As Whirlpool argues, the appellants conceded that their negligence claim was one for pure economic loss.[6] The appellants seek to re-characterize their claim on appeal.

---

[6] The Notice of Motion dated September 21, 2012 filed with the motion judge to obtain an order dismissing the appellants' individual actions, indicates as ground (c), that in dismissing the certification motion the court found that it is plain and obvious that a negligence claim for pure economic losses for a non-dangerous negligently designed consumer product is untenable, that there is no tenable contractual or statutory claim underpinning the appellants' claims for economic losses, and that the waiver of tort claim is untenable. Ground (d) provides that the appellants "have conceded that no other claim is being

[75] While the appellants amended their statement of claim several times, they did not claim clothing as a head of damages. This was not an oversight: only two of the three appellants pleaded that their clothing was damaged because a smell was imparted on them, and counsel for the appellants conceded in the course of submissions that many of the proposed class members may not have suffered "damage" to their clothing.

[76] Moreover, the appellants who alleged that their clothing was damaged because a smell was imparted on them did not plead that the smell was in any way lasting, that they were unable to wear their clothing as a result, or that there was any physical damage to the clothing. The proposition that such *de minimis* harm could give rise to an actionable negligence claim is dubious.

[77] In *Rothwell v Chemical and Insulating Co.*, [2007] UKHL 39, [2008] 1 A.C. 281, at para. 8, Lord Hoffman affirmed the familiar principle that "[a]n action for compensation should not be set in motion on account of a trivial injury. *De minimis non curat lex.*"

[78] Although written in the context of tort liability for psychiatric injury, McLachlin C.J.'s comments from *Mustapha v. Culligan*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 9, are apt:

---

pursued in their individual action". The accompanying letter to Perell J. from S. Gordon McKee, dated September 21, 2012, and copied to the appellants, indicates, "While the plaintiffs do not consent to the motion, they do not oppose it and confirm their agreement with the statements in ground (c) and (d) of the notice of motion (that no other claims are being pursued in the individual action)."

> The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (C.A.): "Life goes on" (para. 60).

[79] As to the cost of buying the Affresh tablets, as noted above, none of the appellants pleaded that he or she purchased Affresh, and the evidence was that only one of them (Ms. Jacobs) did. Agreeing as I do that the appellants' claim in negligence is not, in substance, one for physical damage to property, I would not characterize the cost of purchasing Affresh as an expense incurred to prevent damage to property.

(2) The motion judge erred in concluding that *Winnipeg Condominium* settled that there is no recovery in tort for defective, non-dangerous consumer products

[80] I agree with the appellants that *Winnipeg Condominium* did not settle that there is no recovery in tort for economic loss caused by defective, non-dangerous consumer products.

[81] In *Winnipeg Condominium*, a condominium corporation – the subsequent purchaser of a building – sued the general contractor responsible for the construction of the building for the cost of repairing structural defects in the masonry work on the outside of the building. The damages incurred – the cost of repairing the cladding – were purely economic. The Supreme Court held that the condominium could recover the cost of repairing the defects because they posed a real and substantial danger.

[82] At para. 36, La Forest J. explained:

> If a contractor can be held liable in tort where he or she constructs a building negligently and, as a result of that negligence, the building causes damage to persons or property, it follows that the contractor should also be held liable in cases where the dangerous defect is discovered and the owner of the building wishes to mitigate the danger by fixing the defect and putting the building back into a non-dangerous state. In both cases, the duty in tort serves to protect the bodily integrity and property interests of the inhabitants of the building.

I repeat for ease of reference his comments, at para. 41:

> Given the clear presence of a real and substantial danger in this case, I do not find it necessary to consider whether contractors should also in principle be held to owe a duty to subsequent purchasers for the cost of repairing non-dangerous defects in buildings…. I would require argument more squarely focused on the issue before entertaining this possibility.

[83] In my view, the Supreme Court carefully left the issue of whether there should be no recovery for pure economic loss where goods are shoddy, but not

dangerous, for another day. The Nova Scotia Court of Appeal came to the same conclusion: see *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2007 NSCA 70, 255 N.S.R. (2d) 164, leave to appeal refused, [2007] S.C.C.A. No. 425. Academic commentary is to the same effect: in *Economic Negligence*, at p. 195, Professor Feldthusen states that the Supreme Court "expressly left the question of negligence liability for non-dangerous defects open for future consideration."

[84] Nor did the other authority principally relied on by the motion judge – this court's decision in *Mariani v. Lemstra* (2004), 246 D.L.R. (4th) 489, leave to appeal refused, [2004] S.C.C.A. No. 355 – settle the issue in Ontario. Like *Winnipeg Condominium*, *Mariani* involved a dangerous defect in a building. The issue was whether or not the plaintiff fell within the principle in *Winnipeg Condominium*, not whether that principle should be extended to non-dangerous consumer goods.

[85] *Ducharme v. Solarium de Paris Inc.*, [2008] O.J. No. 1558, a more recent decision of the Divisional Court also relied on by the motion judge, similarly involved the integrity of a structure. *Ducharme* was indeed binding on the motion judge, and it clearly states that there can be no recovery for economic loss for shoddy products absent danger to property or persons. However, the Divisional Court simply asserted, at para. 23, that there can be no liability, without any

analysis or support other than *Winnipeg Condominium* – which, as discussed above, does not establish or preclude such liability.

[86] However, as I explained above, the motion judge proceeded to analyse the appellants' claim for economic loss as if the issue were not yet settled. He assumed that the appellants had established a *prima facie* duty of care at step one of *Anns* but held that the duty should be negated for policy reasons at step two. He therefore concluded that the appellants' negligence claim had no reasonable prospect of success.

(3) The motion judge was entitled to decide the issue on the certification motion without the need for a trial

[87] The appellants submit that the motion judge erred in conducting a policy analysis without a full evidentiary record.

[88] As this court commented in *Haskett v. Equifax* (2003), O.R. (3d) 577, a judge must proceed cautiously if she conducts a stage two policy analysis under the *Anns* test on a pre-trial motion. Feldman J.A. explained, at para. 24, that while the judge may well recognize potential policy concerns at the second stage, she should be circumspect in using those policy concerns to decide the "plain and obvious" question without a statement of defence and without any evidence. She cautioned, at para. 52:

> A court should be reluctant to dismiss a claim as disclosing no reasonable cause of action based on

> policy reasons at the motion stage before there is a record on which a court can analyze the strengths and weaknesses of the policy arguments…. [Citations omitted.]

[89] In certain circumstances, however, a policy analysis can be conducted on a pleadings motion: the detailed policy analysis conducted by the Supreme Court in *Winnipeg Condominium* resulting in a conclusive recognition of a duty of care was undertaken on appeal from a pleadings motion. Doherty J.A. in *Taylor*, at para. 22, provides some guidance: "If the question gives rise to genuine legal or factual uncertainties, it cannot be answered at this stage and the answer must await a trial and a complete record."

[90] It is also important to consider what, in a particular case, a factual record could reasonably be expected to add to the court's determination. In *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660 (appeal to the Court of Appeal listed for November 25-29, 2013), Lax J., concluded at the end of trial that the full record before her would not have assisted her in deciding whether the plaintiffs' waiver of tort claim was a viable cause of action in Ontario. She provided the following insight, which in my view is not limited to the waiver of tort issue, at paras. 585 and 587:

> The extensive factual record that was developed during a 138 day trial did not illuminate for me the important issues of policy that were meant to arise from the trial record. The written submissions of the parties did not rely on any evidence from the factual record in advancing arguments to support or oppose extending

> the waiver of tort doctrine to a negligence case. The plaintiffs did not lead any policy evidence to explain why waiver of tort should be available in a product liability negligence case.
>
> …
>
> While generally, courts are reluctant to determine unsettled matters of law at a pre-trial stage and particularly on a pleadings motion, there is certainly precedent for doing this…. My experience from this trial suggests that deciding the waiver of tort issue does not necessarily require a trial and that it may be possible to resolve the debate in some other way.

[91] On the facts pleaded in this case, it is doubtful that a full factual record would have been of assistance to the trial judge in deciding the legal question of whether Whirlpool owes the appellants a duty of care. As discussed above, the pleading raises the most minimal allegations of harm. This is not a case where a trial is needed to see how much of what is claimed is actually proved. Nor did counsel provide any meaningful indication of the nature of the policy evidence the appellants would lead if the matter proceeded to trial. And unlike in *Haskett*, a statement of defence was before the court.

[92] At the same time, the motion judge had the benefit of a significant body of jurisprudence to assist in answering this precise question: see e.g. *Ducharme*; *Zidaric v. Toshiba of Canada Ltd.* (2000), 5 C.C.L.T. (3d) 61 (Ont. S.C.); *M. Hasegawa & Co. v. Pepsi Bottling Group (Canada) Co.* (2002), 213 D.L.R. (4th) 663. This indicates that the issue is not an entirely novel one. Moreover, in this case there is an existing, relevant statutory framework, discussed below, as well

as abundant academic commentary on the subject of tort liability for shoddy, non-dangerous consumer goods.

[93] Moreover, in my view, the continued uncertainty in the law in this area promotes increased litigation and litigation costs that hinder the access-to-justice function of class proceedings. This case is illustrative: costs against the appellants for the certification motion, as agreed to by the parties, were $278,500. The negligence issue significantly complicated the certification motion.

[94] As Abella J. held in *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 19, the benefit of testing the viability of a novel claim on a Rule 21 motion is obvious: “If there is no legally recognized duty of care … there is no legal justification for a protracted and expensive trial.” Access to justice would not be served by forcing these parties on to an even more costly trial.

[95] I conclude that the motion judge did not err in deciding the appellants’ negligence claim on the certification motion.

(4) The motion judge was correct to conclude that the appellants’ negligence claim had no reasonable prospect of success

[96] At its core, the appellants’ economic loss claim is for diminution in value – that is, the difference in value between the product they thought they were getting and the one they actually received. In my view, it is clear that such a

claim has no reasonable prospect of success in light of the jurisprudence and the relevant statutory framework, both of which I discuss in more detail below.

(a) Quantum leap from *Winnipeg Condominium*

[97] While it is trite to observe that the law is not static and unchanging, recognizing the possibility of tort liability on the pleaded facts of this case would represent such a quantum leap that it is plain and obvious the appellants' negligence claim will not succeed.

[98] As I have explained, in *Winnipeg Condominium*, the plaintiff was entitled to recover the reasonable cost of putting the building into a non-dangerous state. The Supreme Court specifically disallowed the cost of any repairs that would merely improve the quality of the building.

[99] LaForest J. concluded that policy considerations did not negate a contractor's duty to ensure that the building is free from defects that "pose foreseeable and substantial danger to the health and safety of the occupants" (para. 54). Risk of indeterminate liability was not a concern: the class of claimants was limited to the very persons for whom the building was constructed; the quantum of damages recoverable was limited to the reasonable cost of repairing the building to a non-dangerous state and mitigating the danger; and the contractor was only liable during the useful life of the building.

[100] While “warranties respecting quality of construction are primarily contractual in nature and cannot be easily defined or limited in tort” (para. 44), it was appropriate to recognize a tort duty to construct a building without dangerous defects, independent of contract. The court held that the doctrine of *caveat emptor* should not shield a contractor from liability for dangerous defects. Because of their expertise, contractors and builders are in a better position to ensure that buildings are free from dangerous latent defects than purchasers are to detect them.

[101] The extension of liability in *Winnipeg Condominium* derived from conventional concerns of protection of bodily integrity and property interests. Here, the appellants have abandoned their claim that the washing machines pose a real and substantial danger to their health and safety and to the physical well-being of the proposed class members.

[102] As discussed above, the case is not about damage to property. Nor is the primary relief sought even damages for what might normally be considered economic loss. This case is not about the cost of repairs and replacement parts – an individual issue, requiring proof – or losses arising from the fact that allegedly defective products were not available for use. On the contrary, the pleadings

suggest that the representative plaintiffs continued to own and use their Whirlpool washing machines even after the litigation was commenced.[7]

[103] On appeal, the appellants accept that design changes Whirlpool made to machines manufactured in 2007-2008 sufficiently (although not completely) alleviated the problem of biofilm buildup and resultant odours. They concede that such machines should be excluded from the class definition.

[104] The nature of the relief that the appellants seek is expectation damages for breach of contract, calculated as if Whirlpool had warranted that the machines they were purchasing would be of the same quality as machines subsequently designed and manufactured by Whirlpool in 2007-2008.

[105] At its heart, the appellants' claim is that they paid more for their washing machines than they are worth. It is squarely about relative product quality – a matter that, as LaForest J. noted in *Winnipeg Condominium*, is customarily dealt with by contract and not easily defined by tort. In my view, requiring the courts to analyze a myriad of consumer transactions – some involving small outlays of money for goods that quickly depreciate and become redundant – in tort, without the framework of consumer protection legislation, to determine whether the

---

[7] The representative plaintiffs were cross-examined on their affidavits. Ms. Oliver testified that she replaced her washing machine in July 2010. Ms. Jacobs testified that she began using a different washing machine in November 2010. The Amended Amended Amended Statement of Claim is dated June 10, 2010.

consumer received value for his or her money, would burden an already taxed court system.

(b) Commercial vs. Consumer transactions and consumer protection legislation

[106] The appellants submit that the policy considerations which may negate the duty of care in the commercial context should not apply in the consumer context. Unlike both *Martel Building* and *Hasegawa*, where the courts held that the parties' commercial contracts already allocated the risk for poor quality, consumers like the appellants are not in a position to negotiate contractual warranties provided by manufacturers. Their choice is not to buy. I accept these submissions.

[107] I also agree with the appellants that a major impetus for class proceedings legislation in Ontario was to provide access to justice for consumer claims, including those for defective products. See for example the *Ontario Law Reform Commission's Report on Class Actions (Toronto: Ministry of the Attorney General, 1982)* at p. 121, citing *Naken v. General Motors Ltd.* (1978), 21 O.R. (2d) 780, at pp. 784-785, rev'd on other grounds, [1983] 1 S.C.R. 72. I would also note that McLachlin C.J. in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 26-29, in discussing the role of class proceedings and their three advantages – judicial economy, access to justice, and behaviour modification – specifically mentioned faulty consumer

products. I further recognize that, where the manufacturer, as opposed to the retailer, is the defendant, the class would be larger, and the litigation therefore often more economical.

[108] On the other hand, it is noteworthy that the legislature has enacted broad consumer protection legislation: in Ontario, the *Business Practices Act*, R.S.O. 1990, c. B.18 (the "BPA") in respect of consumer agreements entered into before July 30, 2005, and the significantly expanded *Consumer Protection Act* (the "CPA") in respect of consumer transactions entered on or after that day. This legislation applies to the purchase of a washing machine.

[109] Both the BPA and the CPA permit a consumer to claim against a manufacturer who engages in an "unfair practice", which is defined to include false, misleading, deceptive and unconscionable representations. Under the BPA and the CPA, damages are an available remedy. In certain cases where rescission is not available, remedies for an unfair practice include recovery of an amount by which payment under the consumer agreement exceeds the value that the goods have to the consumer. This is essentially the remedy that the appellants seek in this litigation without pleading an unfair practice.

[110] While both the CPA and the BPA require a consumer to give notice if the consumer wishes to rescind the agreement or otherwise seek recovery (within one year in the case of the CPA and 6 months in the case of the BPA after

entering into the impugned consumer agreement), under the CPA the court may disregard the notice requirement if it is in the interests of justice to do so. The CPA also incorporates the implied conditions and warranties under the SGA and provides that they apply despite any agreement or waiver to the contrary.

[111] I note that the appellants abandoned their claim under the CPA prior to the certification motion. While I cannot speculate as to their reasons for doing so, there was no argument before the court that these statutory provisions were difficult, expensive, inconvenient or otherwise inadequate.

[112] Despite providing these remedies against manufacturers and many other protections for consumers, the CPA does not provide an exception to privity of contract so as to allow consumers to recover against manufacturers for breach of implied warranties of quality or fitness for purpose. Other jurisdictions have done so in their equivalent legislation; see for example Saskatchewan's *Consumer Protection Act*, S.S. 1996, c. C-30.1, s. 55, which predates the Ontario CPA.[8]

[113] When the CPA was first passed, the Ontario legislature's Standing Committee on Finance and Economic Affairs received a written submission highlighting this problem of privity as between manufacturers and consumers, but rejected a proposed amendment that would have attempted to address the

---

[8] "In any action brought pursuant to this Part against a manufacturer, retail seller or warrantor for breach of a statutory, express or additional written warranty, lack of privity of contract between the person bringing the action and the retail seller, manufacturer or warrantor is not a defence, and the retail seller, manufacturer or warrantor is conclusively presumed to have received consideration."

issue.[9] In the more than ten years since then, the legislature has made multiple substantive amendments to the CPA but has not changed the law in this respect.[10]

[114] As Iacobucci J. observed at para. 43 of *Fraser River*, "the legislature is better placed to appreciate and accommodate the economic and policy issues involved in introducing sweeping legal reforms." Where, as here, the legislature considered and did not enact the doctrinal change that would provide the consumer remedy against Whirlpool that the appellants seek, there is in my view no reasonable prospect that a court would fundamentally alter the law of negligence to effectively provide such a remedy. The legislature – which has signalled its intention to regulate consumer transactions through the enactment of consumer protection legislation – should make any such change, after taking into account all relevant considerations, and input from all stakeholders. The court, after a trial between private parties, could not hope to be sufficiently versed in the implications of such a change. It is illusory to think that it would make such a significant change to the law based on any factual record that might develop at trial.

---

[9] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 37th Parl., 3d Sess., No. F-6 (Standing Committee on Finance and Economic Affairs, 4 December 2002) at F-60 - F-61.

[10] One can observe that, in the internet world, manufacturers are more frequently also sellers. Hence, consumers more frequently have recourse against manufacturers *qua* seller under consumer protection legislation. For example, in *Griffin v. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158 (Ont. Sup. Ct.), the manufacturer of the allegedly defective computer sold directly to the consumer.

[115] Moreover, in determining whether the law of negligence should be extended in this case, it must be remembered that this is not a case where the appellants were without a remedy. The SGA and CPA provided a statutory remedy against the seller of the machines for breach of implied warranties of quality and fitness for purpose, and the BPA and the CPA provided remedies against Whirlpool for unfair practices.

Conclusion

[116] Assuming, as the motion judge did, that a *prima facie* duty of care is made out on the pleaded facts, in my view policy considerations negate recognizing a cause of action in negligence for diminution in value for a defective, non-dangerous consumer product. On the pleaded facts, I agree with the motion judge that the appellants should be left to their statutory and contractual remedies, including express, implied or statutory warranties, and "should not look to tort law to negotiate a better bargain for themselves" (para. 28).

G. WAIVER OF TORT

[117] The motion judge held that the appellants' waiver of tort claim failed to satisfy s. 5(1)(a) of the *Class Proceedings Act* because there was no predicate wrongdoing upon which to base a plea of waiver of tort, be it a remedy or a cause of action. He provided a helpful summary of the state of the law on waiver of tort, at paras. 297-299:

The last cause of action to consider is the claim of waiver of tort. One could write a lot about this topic, but for present purposes I can be brief. Historically, the doctrine of waiver of tort provided the victim of certain types of tortious wrongdoing with the option of foregoing (waiving) tort compensation measured by the damages suffered by the victim and claim instead disgorgement of the tortfeasor's ill-gotten gains. The traditional view was that waiver of tort was a remedy available for certain torts.

Without deciding the point, *Serhan v. Johnson & Johnson* [(2006), 85 O.R. (3d) 665 (Div. Ct.), leave to appeal to C.A. refused, Oct. 16, 2006, leave to appeal that denial of leave to S.C.C. refused, [2006] S.C.C.A. No. 494], initiated a debate about whether waiver of tort was not just a remedial choice but rather a cause of action available for more than the traditional short list of torts for which it had been available as a remedy or perhaps for wrongdoing generally. In other words, there has been a debate about the doctrinal nature of waiver of tort and the range of its availability. There, however, has been one point beyond debating. Whether a remedy or a cause of action, for waiver of tort to be available, the defendant must have done something wrong.

In *Aronowicz v. Emtwo Properties Inc.*, [2010 ONCA 96, 98 O.R. (3d) 641], at para. 82, Justice Blair stated about the waiver of tort doctrine:

> 82. Whether the claim exists as an independent cause of action or whether it requires proof of all the elements of an underlying tort aside, at the very least, waiver of tort requires some form of wrongdoing. The motion judge found none here. No breach of contract. No breach of fiduciary duty, or duty of good faith or confidentiality. No oppression. No misrepresentation. No deceit. No conspiracy. As counsel for Mr. Grinshpan

> put it in their factum, "its eleventh hour insertion into the statement of claim does not provide the appellants' claim with a new lifeline given that the record discloses no wrongful conduct on the part of the respondents in respect of any of the causes of action pleaded."

[118] The motion judge concluded, at paras. 300-301:

> In the case at bar, for the reasons discussed earlier, in my opinion, it is plain and obvious that there is no predicate wrongdoing upon which to base a plea of waiver of tort. All of the proposed causes of action are untenable and thus there is no predicate wrongdoing to support a claim of waiver of tort be it a remedy or a cause of action.
>
> Accordingly, the waiver of tort claim also fails to satisfy s. 5 (1)(a) of the *Class Proceedings Act*, *1992*.

[119] The appellants' primary submission is that the motion judge erred in finding that the claim for waiver of tort was untenable because all of the proposed causes of action were untenable.

[120] With respect to their negligence claim, I understand them to argue in the alternative that if a *prima facie* duty of care is negated on policy grounds, but a breach of such a duty of care, had one been found to exist, is established, there would be sufficient wrongful conduct to ground a claim for waiver of tort.

[121] I have concluded that the appellants did not plead a tenable cause of action and agree with the motion judge that there is therefore no predicate wrongdoing upon which to base a plea of waiver of tort. I also conclude that the

appellants' alternative argument is without merit; if no duty of care is established, there is no legal wrong doing and no basis to argue waiver of tort.

H. SUMMARY CONCLUSION

[122] I conclude that the motion judge did not err in determining that the pleadings do not disclose a cause of action. I would accordingly dismiss these appeals.

I. COSTS

[123] As Whirlpool is the successful party on these appeals, I would award it costs in the agreed-upon amount of $40,000, plus HST.

RELEASED: "AH" "OCT 31 2013"

"Alexandra Hoy A.C.J.O."
"I agree K. Feldman J.A."
"I agree Janet Simmons J.A."