Evidence of online complaints of limited utility on motion for certification

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In *Carter v. Ford Motor Company of Canada*[1] (*Carter*), the Ontario Superior Court of Justice struck portions of a lawyer's affidavit that summarized and attached as exhibits various unverified online complaints. The complaints had been tendered to help demonstrate some basis in fact for an alleged defect. In its decision, the court emphasized the limited utility of online complaints to demonstrate some basis in fact, and the narrow scope of documentary evidence that may be submitted through a lawyer's affidavit.

Evidence submitted for "some basis in fact"

In *Carter*, the plaintiffs alleged that some of the defendants' vehicles contained a defective water pump system and that the defendants were aware of the defect. In support of its motion for certification, and to demonstrate some basis in fact that the defendants were aware of the defect, the plaintiffs submitted a lawyer's affidavit that attached as exhibits anonymous complaints from the website of the U.S. National Highway Traffic Safety Administration (NHTSA).

As noted by the defendants, the evidence of NHTSA complaints raised a number of concerns including that:

1. the individuals who made the complaints were not identified;
2. the complaints were not verified or corroborated;
3. the statements were more prejudicial than probative; and
4. many postings were argumentative, inflammatory, and/or expressions of opinion.

Evidentiary burden for certification motions and limited value of online complaints

While recognizing that the standard of proof required on a motion for certification is unique (*i.e.* low), the court emphasized that the normal rules with respect to admissibility, including hearsay evidence, still apply. While a plaintiff need only demonstrate "some basis in fact" for the proposed common issues, the evidence submitted to meet that threshold must be admissible. Further, the court reiterated that

documentary evidence may only be admissible through a lawyer's affidavit if the evidence is probative of a material fact in issue and the probative value outweighs any prejudice caused by admitting the evidence.

This decision follows earlier decisions addressing the limited value of online complaints, such as *Thorpe v. Honda Canada Inc*.[2] (*Thorpe*), *Williams v. Canon Canada Inc*.[3], and *Beazley v. Suzuki Motor Corp*[4]. In each of these cases, the courts determined that anonymous online complaints were of limited (or no) probative value on a motion for certification and were inadmissible. In *Thorpe* (cited with approval in *Williams*), the court suggested that certain online information *could* be admissible if sufficiently reliable. Indicia of reliability included whether the information came from an official website of a well-known organization, whether the information could be verified, and whether source of the information was disclosed.[5] These factors were not present in *Carter*.

Ultimately, in *Carter*, the court concluded that the NHTSA complaints constituted hearsay evidence and were not admissible. Further, any limited probative value was outweighed by its prejudicial effect. On this basis, the complaints were deemed inadmissible and were not permitted to be admitted through a lawyer's affidavit. The court subsequently released its decision on certification, significantly limiting the scope of the plaintiffs' case and granting certification for the design negligence claim only.[6]

Key takeaways

Because the evidentiary threshold on certification is low, plaintiffs have increasingly "pushed the envelope" in terms of the materials they file in order to meet the test. This decision is a useful reminder that, while the standard of proof may be lower on a certification motion, it still requires the plaintiff to file evidence that would be admissible under the ordinary rules of evidence.

[1] 2021 ONSC 4137.

[2] *Thorpe v. Honda Canada Inc*., 2010 SKQB 39.

[3] *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 (aff'd 2012 ONSC 3692 (Div Ct).

[4] *Beazley v. Suzuki Motor Corp*., 2010 BCSC 681.

[5] *Thorpe*, *supra* at para 22.

[6] *Carter v Ford Motor Company of Canada*, 2021 ONSC 4138.

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