EXHIBIT 35

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NAKEN et al. v. GENERAL MOTORS OF CANADA LTD. et al.

Supreme Court of Canada, Laskin C.J.C., Dickson, Beetz, Estey and McIntyre JJ. February 8, 1983.

Practice — Class actions — Action on behalf of all buyers of type of motor vehicle alleged to be defective — Allegation that members of class entitled to rely upon warranties made in advertising of manufacturer — Claim for fixed sum on behalf of each member of class — Whether statement of claim discloses proper cause of action — Rule 75 (Ont.).

Four individual plaintiffs sued on behalf of themselves and all other persons who had purchased and still owned at the date of the writ motor vehicles of a certain make and model manufactured and marketed by the defendant. The plaintiffs claimed the sum of $1,000 for each member of the class, alleged to be the amount by which each vehicle so purchased had depreciated in resale value. The plaintiffs' claim was based upon warranties expressly made in printed material distributed by the defendant in advertisements that the vehicles were durable, tough and reliable whereas the vehicles were alleged not to satisfy such warranty but to be defective in numerous respects. An application to strike out the action was dismissed by the chambers judge but the Divisional Court allowed an appeal and struck out the statement of claim and dismissed the action. An appeal to the Ontario Court of Appeal was dismissed, but the plaintiffs were given leave to file an amended statement of claim whereby the class represented would include only those purchasers of the vehicle who saw the printed materials or published advertisements of the defendant and purchased the vehicle as a result. The defendant appealed the order to the Supreme Court.

Held, the appeal should be allowed and the action dismissed. Ontario Rule 75 was entirely inadequate to the task which the plaintiffs brought before the courts in reliance upon it. The proceedings would require at least three stages, namely, a trial on the issue as to whether there was a cause of action, and, if so, whether it sounded in damages; second, a reference to the master to conduct hearings to determine what persons, if any, qualified for inclusion in the class; and third, receipt of the master's report by the trial judge and computation of the total damages to be awarded. The rule made no provision for this nor for other important matters such as the rights of those owners of the vehicle unwilling to be represented in the action, the costs to be awarded against unsuccessful owners seeking admission in the representative group, discovery, production or other pre-hearing stages in connection with proceedings before the master, or for the deprivation of the right to have the issue fully tried in the High Court. The present action required a procedure or determinative process to identify those entitled to claim and would require the master to try up to 4,932 claims and the particular damages suffered by each claimant. Such hearings would be complex and all the techniques and machinery of the adversary system would come into play. The rule made no provision for discovery or costs in such proceeding, nor was there provision for the manner in which the trial judge would review the master's report. The defendant could be put to the active defence of several thousand claimants for membership in the class in the absence of any authority to award costs against unsuccessful claimants. Moreover, the judgment in favour of a class member might be *res judicata* and bar subsequent or additional claims for personal injury suffered by reason of the deficiencies in the automobile. While the requirement for the same interest is not to be read narrowly so as to require all members of the class to have

same property interest in the same vehicle, it is not enough under Rule 75 that the group share a "similar interest" in a sense that they have varying contractual arrangements which give rise to different but similar claims in contract. It is difficult to extend the rule beyond a more conventional case where the action involves a discernable fund or asset, and there only remains to be determined the right of the plaintiffs to the asset in whole or part, and the right of the individual members of the plaintiff class to a part of the total class entitlement.

Duke of Bedford v. Ellis, [1901] A.C. 1; *Markt & Co., Ltd. v. Knight Steamship Co., Ltd.*, [1910] 2 K.B. 1021; *Beeching v. Lloyd* (1855), 3 Drewry 227, 61 E.R. 890; *May v. Wheaton* (1917), 41 O.L.R. 369; *Farnham et al. v. Fingold et al.* (1973), 33 D.L.R. (3d) 156, [1973] 2 O.R. 132; *Cobbold et al. v. Time Canada Ltd.* (1976), 71 D.L.R. (3d) 629, 13 O.R. (2d) 567, 1 C.P.C. 274; *Seafarers Int'l Union of Canada et al. v. Lawrence* (1979), 97 D.L.R. (3d) 324, 24 O.R. (2d) 257, 13 C.P.C. 281; *Stephenson v. Air Canada* (1979), 103 D.L.R. (3d) 148, 26 O.R. (2d) 369, 14 C.P.C. 40; *Shaw et al. v. Real Estate Board of Greater Vancouver* (1973), 36 D.L.R. (3d) 250, [1973] 4 W.W.R. 391; *Vasquez v. Superior Court of San Joaquin County* (1971), 484 Pac. Rptr. 2d 964; *Alberta Pork Producers' Marketing Board et al. v. Swift Canadian Co. Ltd. et al.* (1981), 129 D.L.R. (3d) 411, 16 Alta. L.R. (2d) 313 26 C.P.C. 72, **discd**

Other cases referred to

Thomson v. Victoria Mutual Fire Ins. Co. (1881), 29 Gr. 56; *Drohan et al. v. Sangamo Co. Ltd.*, [1972] 3 O.R. 399; *Bowen v. MacMillan* (1921), 21 O.W.N. 23; *Shields v. Mayor*, [1953] 1 D.L.R. 776, [1953] O.W.N. 5; *Taff Vale R. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426; *Chastain et al. v. British Columbia Hydro & Power Authority* (1972), 32 D.L.R. (3d) 443, [1973] 2 W.W.R. 481; *Alden v. Gaglardi et al.* (1970), 15 D.L.R. (3d) 380; affd 16 D.L.R. (3d) 355, [1971] 2 W.W.R. 148; affd 30 D.L.R. (3d) 760, [1973] S.C.R. 199, [1973] 2 W.W.R. 92; *Altman et al. v. Manhattan Savings Bank* (1978), 83 Cal. App. 3d 761; *D'Amico v. Sitmar Cruises, Inc. et al.* (1980), 109 Cal. App. 3d 323; *Eisen v. Carlisle* (1974), 417 U.S. 156; *Cartt v. Superior Court, County of Los Angeles* (1975), 50 Cal. 3d 960; *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256; *Cahoon v. Franks* (1967), 63 D.L.R. (2d) 274, [1967] S.C.R. 455, 60 W.W.R. 684; *Cox v. Robert Simpson Co. Ltd. et al.* (1973), 40 D.L.R. (3d) 213, 1 O.R. (2d) 333; *American Pipe & Construction Co. v. Utah* (1974), 414 U.S. 538

Statutes referred to

Code of Civil Procedure, R.S.Q. 1977, c. C-25, arts. 1002-1051

Rules and regulations referred to

Code of Civil Procedure (Cal.), Rule 382
Federal Court Rules (U.S.), Rule 23
Rules of Court (Alta.), Rule 42
Rules of Practice (Ont.), Rules 66, 67, 69, 75, 126, 499
Rules of Practice, 1881 (Ont.), Rule 98
Rules of Practice, 1888 (Ont.), Rule 315
Rules of Practice, 1897 (Ont.), Rule 200
Rules of the Supreme Court (U.K.), O. XVI, Rule 9

APPEAL from an order of the Ontario Court of Appeal, 92 D.L.R. (3d) 100, 21 O.R. (2d) 780, 7 C.P.C. 209, 8 C.P.C. 232, varying an order of the Divisional Court, 79 D.L.R. (3d) 718, 17

O.R. (2d) 193, 4 C.P.C. 123, allowing an appeal from a judgment of Osler J., 66 D.L.R. (3d) 205, 11 O.R. (2d) 389, by striking out a statement of claim as disclosing no reasonable cause of action, but granting leave to amend the statement of claim.

Douglas K. Laidlaw, Q.C., and *Ronald Slaght*, for appellant.
Vernon I. Balaban and *Jeffery S. Lyons*, Q.C., for respondents.

The judgment of the court was delivered by

ESTEY J.:—The respondents (plaintiffs) seek to avail themselves of a provision in the Rules of Practice of the Supreme Court of Ontario to bring a class action against the appellant (defendant) for damages suffered as the result of the purchase of certain automobiles. The virtue and benefit of the institution of the class action is not here on trial; only the availability of that kind of proceeding in the circumstances of this case. Neither is this issue to be resolved on the basis of weighing the advantages of the representative action for the plaintiff and the disadvantages of such an action for the defendant (although a study of these factors may assist in the process) but rather on the basis of the correct interpretation of this rule of court and its application to the circumstances of the parties to this action.

This appeal finds its origins in an action commenced in a class action or representative class action by four individuals suing for themselves and on behalf of others forming a class described in the pleadings. The endorsement in the writ of summons states:

> The Plaintiff's claim is for damages in the amount of $5,000,000.00 for breach of warranty and for breach of representation with respect to the sale of 1971 and 1972 Firenza Motor Vehicles in the Province of Ontario.
>
> The Plaintiffs further claim the sum of $1,000.00 for costs.

The immediate origin of these proceedings is in an application by the defendant under Rule 126 to strike out the statement of claim as disclosing no reasonable cause of action. While the record does not include this notice of motion, nevertheless the formal order issued by the judge of first instance sitting in Weekly Court, Toronto, states:

> Upon motion ... by ... the defendant [appellant] ... for an order striking out the statement of claim herein and dismissing the action ...

In an application for these purposes under Rule 126 the court assumes the statement of claim to have been proven for the purpose of determining the issue raised in the application.

The statement of claim filed by the four plaintiffs describes the class as follows:

> The Plaintiffs Helen Naken, Stephen Cranson, William J. Pearce and Roberto Bandiera all reside in the Municipality of Metropolitan Toronto and sue on their own behalf and on behalf of all persons who purchased new 1971 or 1972 Firenza motor vehicles in Ontario and who at the date of the Writ had not sold or otherwise disposed of the vehicle and shall hereinafter be referred to as "the class".

The gist of the action is revealed in para. 9 of the claim which states:

> 9. Because of this breach of warranty, the value of each and every 1971 and 1972 Firenza motor vehicle has depreciated in the re-sale market.

With reference to the warranty the plaintiffs pleaded:

> 8. The warranty given to each Plaintiff and to each member of the class was breached in that unusually large numbers of 1971 and 1972 Firenza motor vehicles were not of merchantable quality, were not reasonably fit for use as a motor vehicle, and were not "durable", "tough" and "reliable".
>
> . . . . .
>
> 10. As a consequence, the re-sale value of each such Firenza motor vehicle is approximately $1,000.00 less than the re-sale value of a motor vehicle of comparable age, size and purchase price on the market.

The prayer for relief is simply a request for $1,000 for "each plaintiff and each member of the class".

In response to demands for particulars by the defendant, the plaintiffs stated:

(a) 4,602 persons purchased new 1971 and 1972 Firenza vehicles in Ontario;

(b) the exact number of those who had sold or disposed of their vehicle at the date of the writ (July 13, 1973) is unknown;

(c) the defects in the Firenza were alleged to include such matters as steering mechanism, braking, fuel line leakage, transmission breakdown, faulty universal joint in the drive shaft, etc.; and

(d) the warranties mentioned in the statement of claim "are contained in contracts . . . [which] . . . were partly oral and partly written. The warranties . . . were expressly made in printed material described by the defendant . . . and contained in newspaper advertisements placed by the defendant in Ontario."

Osler J. in Weekly Court dismissed the application to strike out the statement of claim as he would have allowed the action to proceed [66 D.L.R. (3d) 205, 11 O.R. (2d) 389]. In response to an application by the appellant for leave to appeal to the Divisional Court, Hughes J. granted leave under Rule 499 and in doing so again referred to the application as being one to strike out the

statement of claim and dismiss the action. Hughes J. indicated that the type of amendment proposed by Buckley L.J. in the *Markt* case, *infra*, may be a solution in these proceedings. Rule 499 requires that the judge "hearing the application [have] good reason to doubt the correctness of the decision" [subrule (3)(*b*)]. Accordingly, appeal was taken by the appellant to the Divisional Court. The Divisional Court allowed the appeal, struck out the statement of claim and dismissed the action [79 D.L.R. (3d) 718, 17 O.R. (2d) 193, 4 C.P.C. 123]. The Court of Appeal dismissed the appeal from the order of the Divisional Court but allowed the respondents 30 days to file an amended statement of claim whereby the description of the class to be represented by the respondents would "include only those purchasers of 1971 and 1972 Firenzas who saw the printed materials or published advertisements of General Motors and, as a result, purchased a new Firenza from a dealer" [92 D.L.R. (3d) 100 at p. 114, 21 O.R. (2d) 780, 7 C.P.C. 209]. Application was then made by the appellant for additional argument on the issue of the permitted amendment to the statement of claim. This application was dismissed [92 D.L.R. (3d) at p. 114, 21 O.R. (2d) at p. 795, 8 C.P.C. 232]. Thus the several courts below are evenly divided on whether or not this action conforms to the requirements of Rule 75 of the Rules of Practice of the Supreme Court of Ontario.

The only issue raised in this proceeding turns around the proper interpretation and application of Rule 75 which reads as follows:

> 75. Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all.

This rule has counterparts in the other provinces, some being identical in terminology, and some having subtle differences as in the case of Alberta Rule 42 which reads as follows:

> 42. When numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

The Province of Quebec in the *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, has adopted a comprehensive provision for the bringing and for the conduct of representative actions. *Vide* Book 9, Title Two, arts. 1002 to 1051 wherein detailed provision is made for notice to persons to be affected, costs, and other matters. The application of the class action is limited under the Code to instances where members raise "identical, similar or related questions of law or fact". In other jurisdictions, as for example in the United States Federal Courts, extensive rules have been

adopted which deal with such matters as costs and the right to elect not to be represented. California, as some of the authorities indicate, has enacted a comprehensive statute covering representative actions.

It is common in dealing with actions of this type to refer to them as "class actions". This is an ambiguous term embracing as it does derivative actions, with which we are here not concerned, and representative actions by persons having the same interest in the subject of the litigation which is brought under the leadership of one or more representatives. It is with this type of action that we are here concerned and to which I will refer for simplicity as a "class action".

Rule 75 was taken from the Rules of the Supreme Court of the United Kingdom where O. XVI, Rule 9 reads:

> 9. Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.

It is to be noted that the only difference is the inclusion of the expression "in one cause or matter" relating to the "same interest" which the plaintiffs and those in the class to be represented must demonstrate. This rule came before the House of Lords in the *Duke of Bedford v. Ellis*, [1901] A.C. 1, where it was found that a representative action can be brought by persons asserting a common right under a statute. The defendant in that case was the owner of a market said to be regulated by a statute, and the plaintiffs were farmers who were said to have been given certain rights of market under the same statute. Lord Macnaghten stated (at p. 8):

> Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.

This rule, which had its origin in the practice in the Court of Chancery was, in the view of Lord Macnaghten, "a simple rule resting merely upon convenience" (p. 10). A preliminary demonstration of eligibility within the class did not raise a difficulty which made the rule of convenience impractical, and in any event, the court concluded that the growers whom the plaintiffs sought to represent were a group who came within the contemplation of the rule. The general qualification for a representative plaintiff in the view of Lord Macnaghten was not diminished or destroyed by the fact that such nominal plaintiffs may have been wronged in their individual capacity (at p. 7):

> If the persons named as plaintiffs are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity. They are none the better for that and none the worse. They would be competent representatives of the class if they had never been near the Duke; they are not incompetent because they may have been turned out of the market. In considering whether a representative action is maintainable, you have to consider what is common to the class, not what differentiates the cases of individual members.

Lord Shand concluded (at p. 16) that the plaintiffs:

> . . . all ask the same remedy, which it is unnecessary to specify further than to say they all claim to have a declaratory decree by the Court which shall give effect to their statutory privileges the same in the case of each of them, as growers of fruit, flowers and vegetables, and an injunction to restrain the appellant from doing any act contrary to such declaratory decree. There is thus one cause or matter only in which all of the plaintiffs have an interest, and in which other "growers" have the same interest, as disclosed in the record, that matter being the disregard by the defendant of their statutory privileges, for which accordingly one and the same remedy in the form of the different heads of claim is asked.

It should be observed that in that case a subsidiary question arose as to the individual claims to refund of excessive charges by the owner of the market to the growers. The court found that such a subsidiary claim did not have the effect of destroying the entitlement of the class or group to bring an action on Rule 9. In the end, Lord Shand found that the sole test to be applied is that of "the same interest" in one cause or matter. That is the same test under Rule 75 and I do not believe that the absence of the words "cause or matter" has any effect on the meaning of the rule.

The Court of Appeal of England was concerned with Rule 9 in *Markt & Co., Ltd. v. Knight Steamship Co., Ltd.*, [1910] 2 K.B. 1021, where the factual circumstances more nearly approach those here before the court. A number of shippers had contracted, apparently through bills of lading and perhaps other documents, with a shipowner for the shipment of goods from England to Japan. Upon loss of the cargo following the sinking of the ship by the Russian Navy during the Russo-Japanese war, the plaintiffs, on behalf of themselves and all other owners of the cargo, brought action against the shipowner "for damages for breach of contract". The court (Buckley L.J. dissenting) found that shippers of goods did not have "the same interest" within the meaning of Rule 9. Vaughan Williams L.J. was concerned with the fact that (at pp. 1029-30):

> . . . the contracts . . . manifestly might differ much in their form, and as to the exceptions, and probably would vary somewhat according to the nature of the goods shipped. . . . It may be that some of the shippers were innocent of such

> shipping of contraband goods. All sorts of facts and all sorts of exceptions may defeat the right of individual shippers. The case of each shipper must to my mind depend upon its own merits.

In relying upon an earlier decision, *Beeching v. Lloyd* (1855), 3 Drewry 227, 61 E.R. 890, His Lordship concluded at p. 1032 that:

> . . . where there is a common purpose a plaintiff may sue in a representative capacity even though each party to the common purpose will have individually to shew that he personally was induced by the fraud alleged to do the act in respect of which relief is claimed on his behalf.

Nevertheless, he concluded that the plaintiffs might be left to enforce their own rights but could not proceed under the rule in the form of a representative action. It is interesting to note that in the final analysis, reliance is placed upon the conclusion that (at p. 1032):

> There is no common statutory right as there was in *Duke of Bedford v. Ellis* [*supra*], nor any common fund in course of formation as there was in *Beeching v. Lloyd* [*supra*].

The fund there referred to, in *Beeching v. Lloyd*, was established by the plaintiffs and other persons intending to invest as shareholders in a company under formation, and the action was directed at the recovery of the respective deposits in this fund by the plaintiffs and all other intended investors.

Fletcher Moulton L.J. concurred in the dismissal of the representative action but appears to have put this disposition largely on the ground that the relief sought was damages (at pp. 1040-1):

> Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases.

In reaching this conclusion he did reiterate, however, some of the thoughts quoted above with reference to the judgment of Vaughan Williams L.J. (at p. 1040):

> The proper domain of a representative action is where there are like rights against a common fund, or where a class of people have a community of interest in some subject-matter. Here there is nothing of the kind. The defendants have made separate contracts which may or may not be identical in form with different persons. And that is all. To my mind it is impossible to say that mere identity of form of a contract or similarity in the circumstances under which it has to be performed satisfies the language of r. 9. It is entirely contrary to the spirit of our judicial procedure to allow one person to interfere with another man's contract where he has no common interest. And to hold that by any procedure a third person can create an estoppel in respect of a contract to which he is not a party merely because he is desirous of litigating his own rights under a contract similar in form, but having no relation whatever to the subject-matter of the other contract, is in my opinion at variance with our whole system of procedure and is certainly not within the language of r. 9.

The majority, by their Lordships' different lines of reasoning, concluded that the authorities emphasize (at pp. 1041-2):

> . . . the necessity that there should be a common fund against which the parties represented have claims if the procedure of a representative action is to be used.

In dissent Buckley L.J. proposed an order permitting the plaintiffs to reframe the endorsement on the writ so as to describe a class limited to those shippers who did not ship contraband on the defendant's boat.

The predecessor to Rule 75 first appeared in the 1881 Rules as Rule 98. The only difference between the present rule and the form in which it first appeared is that after the words "same interest" the rule of 1881 contained the words "in one action"; and again the words "in such action" are inserted after the words "authorized by the court to defend". These words are in lieu of the words "in one cause or matter" which appeared, as we have seen, in the English rule when it was Order XVI, Rule 9. The footnote to the 1881 Ontario rule states: "This is the same as the English rule." The rule was reproduced in the rules of 1888 as Rule 315 without any alteration. Finally, in 1897 the rule appeared in its present form as Rule 200 without any explanation for the deletion of the words "in such action". The rule in 1913 became number 75, and has continued unamended in that form to the present time.

The concept of the representative action came into being in the Court of Chancery (the *Markt & Co., Ltd.* case, *supra*, at p. 1021) and was a part of court practice in the Chancery Courts in Ontario before the rules of the common law courts, including Rule 75, were applicable to proceedings in chancery (*Thomson v. Victoria Mutual Fire Ins. Co.* (1881), 29 Gr. 56).

Rule 75 came before the courts of Ontario in 1917 in *May v. Wheaton*, 41 O.L.R. 369. Riddell J. issued an order that the plaintiff, in an action to set aside bequests made under a will, "shall in this action represent the said next of kin and persons who would be so benefited", pointing out in so doing that Rule 75 has no reference to relationships, etc., as between the plaintiff and others "but solely to interest in the result of the action". He went on to say (at p. 371):

> Of course, the object of requiring all parties interested to be joined in the action is to prevent another action where the same issues will be raised: the intention is, that all having identically the same interest shall be bound in one action and one judgment . . .

There was there a "fund" or common asset of finite proportions determinable without a series of individual damage or other

assessment proceedings. There may, of course, be some hearing, with or without evidence, to determine proportionate interests as between claimants on the common fund, but this is a process quite separate and distinct in character from the hearing to determine the finite common fund or asset sought to be recovered *in toto* by a representative action for the class as a whole.

The application of the rule was taken up in the Ontario courts much later by Grant J. when he said in *Drohan et al. v. Sangamo Co. Ltd.*, [1972] 3 O.R. 399 at p. 402:

> The words "persons having the same interest" have been defined as referring not to a relationship but solely to an interest in the result of the action...
>
> That interest is more than merely a like or similar interest, and must be a common interest in the sense that all persons represented will gain some relief though possibly in different proportions and perhaps in different degrees...

citing as authority *May v. Wheaton*, *supra*, and other later cases.

As early as 1921 the Ontario High Court decided that members of a trade union could proceed under Rule 75 to recover lost wages and damages from members of another trade union for conspiracy. The court allowed the action to proceed as: "The damages claimed in this action were general damages to the class, arising out of wrongs alleged to have been done to the class as a class" (*Bowen v. MacMillan* (1921), 21 O.W.N. 23 at p. 25, *per* Ferguson J.A.); but the same court refused to extend the rule to an action to enforce the separate contracts of tenants made with a common landlord in *Shields v. Mayor*, [1953] 1 D.L.R. 776, [1953] O.W.N. 5.

The Court of Appeal of Ontario in *Farnham et al. v. Fingold et al.* (1973), 33 D.L.R. (3d) 156, [1973] 2 O.R. 132, speaking through Jessup J.A., turned its attention to the recoverability of damages under Rule 75 in the light of the remarks of Fletcher Moulton L.J. in *Markt & Co., Ltd.*, *supra*. After referring to the broad concept to be brought to the interpretation of Ontario Rule 75 suggested in the remarks of Lord Lindley in *Taff Vale R. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 at p. 443, Jessup J.A. observed (at p. 160 D.L.R., p. 136 O.R.):

> Rule 75 should be applied to particular cases to produce an expeditious but just result. Thus, where the members of a class have damages that must be separately assessed, it would be unjust to permit them to be claimed in a class action because the defendant would be deprived of individual discoveries, and, in the event of success, would have recourse for costs only against the named plaintiff although his costs were increased by multiple separate claims.

In the *Farnham* case the action arose because a premium above

market price was paid by the defendant to the majority stockholders but not to the minority stockholders in the attempt by the defendant to acquire control of the subject corporation. While this action was derivative, the court concerned itself with the meaning of Rule 75 as regards part of the claims. The judgment continued (at pp. 160-1 D.L.R., pp. 136-7 O.R.):

> However, in the present case it is clear from both the respondent's argument and factum, although not from the pleading, that the only damages alleged by the plaintiff to have been sustained by the class he represents, including damage for conspiracy, is the gross premium above market price received by the controlling shareholders on the sale of their shares to Stanton Pipes Limited and that the individual entitlement of members of the class is simply to a *pro rata* share of such gross premium.

The distinguishing characteristic of this claim, which in the view of the Court of Appeal brings it within Rule 75, is described as follows (at p. 161 D.L.R., p. 137 O.R.):

> However, such gross premium can be fairly simply and readily established and without the evidence of the individual members of the class, whose separate entitlements will be established in proceedings subsequent to trial, to which the defendants need not be parties. In the result, on the facts of this case I would not dismiss the action simply because it sounds in damages.

The High Court of Ontario turned its attention to the question of individual contracts in a representative action under Rule 75 when Stark J. in *Cobbold et al. v. Time Canada Ltd.* (1976), 71 D.L.R. (3d) 629, 13 O.R. (2d) 567, 1 C.P.C. 274, determined that claims for damages, which in essence were simply claims for the continued supply of a magazine under a contract, were not damages of a class or type which would disentitle the plaintiff from invoking Rule 75 (at p. 631 D.L.R., p. 569 O.R.); and the fact that all plaintiffs had individual, separate subscription contracts with the defendant did not by itself disentitle the plaintiffs from proceeding by way of a representative action. Stark J. observed:

> ... a class action is appropriate if it can be shown that success for the plaintiff means success for the other members of the class, especially where the same measure of success applies equally to all.

The Ontario Court of Appeal considered the element of a standard measure of damages in a representative action in *Seafarers Int'l Union of Canada et al. v. Lawrence* (1979), 97 D.L.R. (3d) 324, 24 O.R. (2d) 257, 13 C.P.C. 281. This case concerned in part a derivative action with which we are not here concerned, but in the course of its disposition the Court of Appeal had occasion to discuss the ambit of Rule 75. In reaching its conclusion that Rule 75 did not apply in the case of a damage action for recovery in

defamation, MacKinnon A.C.J.O. observed, with reference to Rule 75 (at p. 330 D.L.R., p. 262 O.R.):

> As appears from Rule 75 and the authorities under it, for a representative action to be properly formed, there must be a "common interest" of the named plaintiff and those he claims to represent. If he wins, all win, because all have been injured as members of the class, and there is no separate defence available against some members of the class and not others.

His Lordship then adverted to the possibility that defences may be different as between defendants in such an action, and consequently the differing measure of damages together with the varying defences combine to destroy the commonality of interest requisite in founding a representative action (*vide* p. 332 D.L.R., p. 264 O.R.). The most recent discussion of the rule in the Ontario courts appears to be that found in *Stephenson v. Air Canada* (1979), 103 D.L.R. (3d) 148, 26 O.R. (2d) 369, 14 C.P.C. 40, where Southey J. found inappropriate to the rule a claim on behalf of all persons who had bought discount rate tickets from the defendant prior to a strike against the defendant's airline which made performance of the ticket contract impossible. The claim was set aside as being unacceptable under this rule because the contracts were not identical and because the damages would require a separate calculation in each instance. His Lordship commented at pp. 149-50 D.L.R., pp. 370-1 O.R.:

> More important, however, it is apparent that the damages suffered by each member of the class would have depended not only on the cost of the ticket for the flight in question, but also on the extent of the inconvenience suffered by the ticket purchaser as a result of being unable to take the Air Canada flight....
>
> There is no common fund or property as in *Farnham et al. v. Fingold et al.* [*supra*]...

The courts in British Columbia have had occasion to consider a rule identical with the former United Kingdom rule, O. XVI, Rule 9, *supra*. A class action was permitted where the remedy sought was a declaration of lack of authority for a public utility to demand security deposits from customers as a condition of service: *vide Chastain et al. v. British Columbia Hydro & Power Authority* (1972), 32 D.L.R. (3d) 443 at p. 454, [1973] 2 W.W.R. 481 at p. 490; *Alden v. Gaglardi et al.* (1970), 15 D.L.R. (3d) 380. In a later case the majority of the Court of Appeal of British Columbia found appropriate to a representative action, claims by member real estate salesmen against the real estate board for distribution of a fund accumulated without authority by the board from commissions earned on real estate sales. The plaintiff and all other member agents of the board claimed a declaration of entitlement

and the amount of individual participation of members of the class in the fund. The variations in the pecuniary entitlement of the claimant members was not a disqualification as a representative action under the rule. Bull J.A., for the majority, stated:

> . . . a class action is appropriate where, if the plaintiff wins, the other persons he purports to represent win too, and if he, because of that success, becomes entitled to relief whether or not in a fund or property, the others also become likewise entitled to that relief, having regard, always, for different quantitative participations.

Shaw et al. v. Real Estate Board of Greater Vancouver (1973), 36 D.L.R. (3d) 250 at p. 254, [1973] 4 W.W.R. 391 at p. 395. He went on to conclude on the facts that there was a "common fund" against which all claimants in varying amounts could claim. McFarlane J.A., in dissent, would have applied *Markt*, *supra*, and struck out the order converting the action into representative form.

It is helpful in the application of the Ontario rule to this action to examine briefly the rules and legislation adopted elsewhere for this type of proceeding. The United States Federal Court Rule 23 providing for class actions was extensively revised in 1966 and now provides in part;

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The rule goes on to provide additional prerequisites to a representative order. The court must find that:

> . . . the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The rights of the members of the class are protected by notice requirements:

> . . . the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

During the course of the action the court may require further advisory notices to class members and in particular may direct the representatives to afford members of the class:

> . . . the opportunity . . . to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action . . .

Finally, the rule directs:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

This rule has been adopted for state courts by a number of states, and a few states have enacted the *Uniform Class Actions Act* prepared by the National Conference of Commissioners on Uniform State Laws. Amongst its detailed provisions may be found the authorization for the court to determine the appropriate monetary relief to which the entire class is entitled and to make a distribution order or plan, including a provision for any residual unclaimed moneys to be paid over to the state and not to be retained by or returned to the defendant.

California followed neither course but adopted a course which combines the Ontario position, in a general sense, and the position of those states and jurisdictions which have adopted rather detailed provisions for the conduct of the representative action. The California Code of Civil Procedure, Rule 382, is expressed in even broader terms than the Ontario Rule 75:

> If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

This rule has been in effect for over one hundred years but in 1971 the state legislature enacted as part of the California Code of Civil Procedure a statute expressly dealing with the institution of class actions. This statute and related parts of the California Code of Civil Procedure adopt a detailed plan for the institution, conduct and disposition of such actions. Even before this statute law became operative, the Supreme Court of California in *Vasquez v. Superior Court of San Joaquin County* (1971), 484 Pac. Rptr. 2d 964, adopted a rather restrictive view of Rule 382 taken by itself (*per* Mosk J., at p. 969):

> . . . we concluded that two requirements must be met to sustain a class action. The first is existence of an ascertainable class, and the second is a well-defined community of interest in the questions of law and fact involved.
>
> (4) As to the necessity for an ascertainable class, the right of each individual to recover may not be based on a separate set of facts applicable only to him.
>
> (5) The requirement of a community of interest does not depend upon an

identical recovery, and the fact that each member of the class must prove his separate claim to a portion of any recovery by the class is only one factor to be considered in determining whether a class action is proper. The mere fact that separate transactions are involved does not of itself preclude a finding of the requisite community of interest so long as every member of the alleged class would not be required to litigate numerous and substantial questions to determine his individual right to recover subsequent to the rendering of any class judgment which determined in plaintiffs' favor whatever questions were common to the class.

(6) Substantial benefits both to the litigants and to the court should be found before the imposition of a judgment binding on absent parties can be justified, and the determination of the question whether a class action is appropriate will depend upon whether the common questions are sufficiently pervasive to permit adjudication in a class action rather than in a multiplicity of suits.

In that case the court did not reject the application to proceed in representative form, at least at the pleading stage (at pp. 971-2):

> . . . because we cannot assume that plaintiffs will be unable to establish their allegations without the separate testimony of each class member; at least they must be afforded the opportunity to show that they can prove their allegations on a common basis.

The court, in construing and applying Rule 382, went even further in prescribing conditions attaching to the grant of authority to litigate the claims in question on a representative basis, by considering itself free to utilize the provisions of the as yet inoperative legislation "in the interests of efficiency". Furthermore, the court observed (at p. 977):

> The technique described in the act may not adequately encompass all the procedural problems facing a court in the trial of a class action. In the event of a hiatus, rule 23 of the Federal Rules of Civil Procedure prescribes procedural devices which a trial court may find useful.

In subsequent decisions, the California Supreme Court rejected a plea for representative status because the damages could not be easily calculated, and each member of the class would be required to litigate numerous and substantial questions in the determination of his individual right to recovery so that the community of interest necessary to maintain a class action was absent: *vide Altman et al. v. Manhattan Savings Bank* (1978), 83 Cal. App. 3d 761, *per* Hastings J. at p. 769; and *D'Amico v. Sitmar Cruises, Inc. et al.* (1980), 109 Cal. App. 3d 323 at p. 326. The latter case is particularly relevant in that the court, despite the fact that the plaintiffs, in seeking to represent the class in its pleadings, limited the total class damage to $900,000 which the plaintiffs sought to have apportioned amongst the members of the class. Notwithstanding the global limitation of the alleged common fund, the application for representative action status was rejected.

The situation in California, as a matter of law, is thus much different from the state of the applicable law in Ontario. In California, the simple rule of court is buttressed by detailed legislation as well as by the incorporation by judicial reference of the more comprehensive federal Rule 23 when, as the court put it in *Vasquez, supra*, "a hiatus" might arise in a class action trial because the state statute was not adequate (p. 977). Despite all these legislative resources, the court appears reluctant to go much beyond the law as we read it in *Markt, supra*. This may be due to a realistic apprehension of the serious problems which arise as in *Eisen v. Carlisle* (1974), 417 U.S. 156, even where the legislative base for the class action goes well beyond the general and cryptic provisions in Rule 75. In that case the United States Supreme Court prescribed conditions of notice to members of the class, and apparently by reason of the cost of giving such notice the action, after an extended period in the courts, petered out. The confusion flowing from the *ad hoc* "judicial legislation" in California of structural rules for the conduct of these actions is illustrated by the very point raised in *Eisen*, when the Supreme Court of California felt compelled to distinguish the *Eisen* case, a decision of the United States Supreme Court under federal Rule 23, in an action concerning the notice requirements to members of the class: see *Cartt v. Superior Court, County of Los Angeles* (1975), 50 Cal. 3d 960.

In a recent report the Ontario Law Reform Commission studied the modern class action and its problems, and in particular Ontario Rule 75, and concluded:

> Even if the courts were able to remove expeditiously the existing prohibitions against the use of the class action device, the skeletal nature of Rule 75 suffers from a host of procedural deficiencies that, we believe, can be addressed only by wholesale reform of the law of class actions in Ontario.

The need for legislative action was signalled by Arnup J.A. in the Court of Appeal below [at p. 113]:

> . . . it would be highly desirable that there be enacted legislation or rules of practice or both, pursuant to which such actions could be conducted.

This digression, it seems to me, is helpful in assessing the latitude, if any, afforded to the courts by the words employed in Rule 75. The experiences and practices elsewhere sometimes properly restrain judicial ardour to ease the way of litigants by broader interpretation of a statute or regulation, particularly an older one, where its language is either sufficiently broad or ambiguous to do so. Here the rule is simple but entirely inadequate to the task which the respondents have brought before the

courts in reliance upon the rule. The rule is very simple; indeed, perhaps too simple. It simply authorizes the bringing of an action of a nature or kind which may be viewed as one stage beyond that contemplated in Rule 66 which authorizes the joinder of actions by persons having a right to relief in the same transaction. Rule 66 states in part:

> 66. All persons may be joined in an action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or occurrence, or series of transactions or occurrences, is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; but, if, upon the application of a defendant, it appears that such joinder may embarrass or delay the trial of the action, the court may order separate trials, or make such other order as may be expedient; and, without any amendment, judgment may be given for such one or more of the plaintiffs as may be found entitled to relief, for such relief as he or they may be entitled to, but the defendant, though unsuccessful, is entitled to his costs occasioned by joining any person who is not found entitled to relief, unless the court otherwise orders.

This rule provides, as seen above, that all persons in whom a right to relief is said to arise out of the same transaction may be joined as plaintiffs rather than proceeding by separate action. The rule, however, provides relief to the defendant where it appears that such a procedure of joinder would give rise to difficulties. Rule 67 makes the same general provision with reference to the right to join as defendants all persons against whom relief is sought, and Rule 69 authorizes the combination of several causes of action with the same plaintiff or plaintiffs and defendant or defendants. Rule 75 then follows and authorizes one person to bring an action "on behalf of, or for the benefit of all where there are numerous persons having the same interest". There are no supporting provisions contained in the succeeding rules and no explanation as to the application of the expression "same interest".

The Court of Queen's Bench of Alberta was faced with a plea to strike out the representative character of an action brought under Rule 42 of that Court's Rules of Procedure, *supra*. Rule 42 refers to persons having "a common interest", whereas Rule 75 refers to persons having "the same interest": *vide Alberta Pork Producers' Marketing Board et al. v. Swift Canadian Co. Ltd. et al.* (1981), 129 D.L.R. (3d) 411, 16 Alta. L.R. (2d) 313, 26 C.P.C. 72. In that case the plaintiffs sought a declaration of entitlement to an orderly market and free competition therein, together with a claim for damages suffered by the class by reason of the tortious conspiracy of the defendants to purchase hogs from the alleged class for prices lower than that which would have prevailed but for the

alleged tortious conspiracy amongst the defendants. The claimed damages are described in the judgment by Dea J. as being "restricted to the difference on each hog transaction made during the period between the price actually paid and the price which would have been paid under the marketing system but for the intervention of the tortious conduct of the defendants" (p. 414). The court found that this was not an instance of accumulation of individual causes of action where it would be necessary to examine each plaintiff and representative plaintiff to assess damages, as for example in personal injury actions, because "no such personal assessment is required here. Here what is required is an assessment of class damages. . . . the fact that the totality of the class damages equals the accumulated damages suffered by each member of the class does not give rise to a defence of accumulation as no assessment of damages personal to the circumstances of any member of the class is required" (p. 419). The court, in reaching the conclusion that such an action properly came with the rule, took into consideration the fact that the denial of discovery against each personal plaintiff was not a serious disadvantage to the defendants. This was so, according to the court, because the practicalities of the situation were that the defendants need only make discovery against the board and that discovery of the individual class members was neither necessary nor desirable for the full conduct of the action.

The court there was not concerned with the problem here at hand because the class of persons represented by the plaintiffs was engaged in the same enterprise and the claim was in reference to sales carried on by persons engaged in such enterprise. Furthermore, the problem of determining the fund from which the class would recover was simple, and the entitlement of individual members of the fund followed the same calculation as that used to determine the fund in the first place. All members of the class computed their participation in the fund on the same formula and basis. The court did not have to determine the meaning of "common interest" because, whatever else the term might include, it clearly took into contemplation by its terminology an action which involved an attack by a group upon a single, determinable fund which might be found owing to that group by the defendant. There were a known number of hogs marketed in the period defined in the statement of claim and the price differential was a mathematical calculation applicable without reference to the individual positions or station of the members of the claimant group during the periods in question.

The rule now before us requires that the plaintiffs and those they seek to represent have the "same interest". It will be observed at once that the rule is silent as to what the interest, which must be the "same", relates. The respondents construe Rule 75 as requiring only that the plaintiff and the represented group have the "same interest" in the outcome or proceeds of judgment. The appellant takes the view that the "same interest" must refer to the subject of the litigation so that on the facts here, the plaintiffs, to have the same interest would, for example, be required to be joint owners of one of these automobiles. Counsel for the appellant adds, however, that he is not required to go that far and submits simply that the plaintiffs are here disqualified because their rights arise under different contracts relating to different automobiles and vary according to the content of the contract, the state of the automobile, etc.; and accordingly they do not in law share "the same interest".

The question then is this: can the action, by standardizing or placing a limit on individual damages at $1,000, and by the Court of Appeal amendment limiting the class to owners who became such in response to and in reliance upon the appellant's advertisements which they saw, be conducted within Rule 75 when properly applied? The proceedings, as described by counsel for the appellant and as appears evident from the nature of the claim asserted in the statement of claim, will unfold in at least three stages. Firstly, the trial judge in the High Court will open a trial on the issue as to whether or not the named respondents or any of them have a cause of action against the appellant and, if so, does their claim sound in damages. If the result of the trial is a finding that the respondents, or any of them, indeed have entered into a contract with the appellant in the nature of the unilateral contract arising in *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256, then the court would presumably, and on the argument as presented to us by the respondents, would be required, to issue an order directing a reference to the Master of the Supreme Court to conduct such hearings as required to determine what persons, if any, qualify for inclusion in the class as described in the amended statement of claim and the extent of their claim up to the $1,000 limit. To arrive at a report to the trial judge the master would, of course, be required to hold hearings, receive evidence and determine the circumstances wherein each applicant for inclusion in the group acquired such an automobile and what damages, if any, such applicant has suffered. The master would then report his findings to the trial judge and the third stage would

commence. In this stage, as the submissions made to this court are understood, the trial judge would then compute the total damages, if any, to be awarded in judgment against the appellant based upon, firstly, the findings of the trial judge in stage one, and secondly, the report of the master, so far as it be accepted by the trial judge, in stage two. Judgment would then be entered against the appellant together with such costs as the trial judge in his discretion might award.

There is, of course, nothing in Rule 75 about all this. Nor is there anything in the rule or any other rule to which our attention was directed which makes provision for owners of these automobiles unwilling to be represented in this action, for costs to be awarded against unsuccessful owners seeking admission to the represented group, for discovery, for production or other pre-hearing stages in connection with the proceedings before the master, for the deprivation of the right of the defendant to have the issue fully tried in the High Court, or for many other considerations of the kind already mentioned.

Traditionally, Rule 75 has been applied to class actions where there is created in the course of the action or as a result thereof a fund or a pool of assets. The fund thereby isolated is then subjected to *pro rata* distribution amongst the respondents and the constituents whom they represent under the rule according to their respective participation in the undertaking or transaction as determined by the court. The simplest form of this kind of action is found where holders of securities bring an action against the issuer or vendor. The class to be represented is easily and unambiguously defined and the fund to be created in damages or property is likewise readily ascertainable in the ordinary processes of the law.

The difficulty raised by these proceedings is that while the statement of claim when amended will describe a group of persons with reference to an identifiable property, a Firenza, owned by each of those persons at the commencement of the action, it is not possible in so many words to take the identification one stage further and limit the group represented in the action as plaintiffs to those who responded to the advertisements of the appellant by acquiring an automobile. This identification requires a procedure or a determinative process of some kind. Thereby, there arises a distinct difference between this kind of proceeding and the simple shareholder type proceeding to which I have already adverted. That, of course, does not decide the issue for or against the respondents. The outcome of these proceedings will depend upon

how one properly characterizes in law this process whereby the identity of the members of the represented group is determined. If it is simply a labelling process, as for example where a security holder comes forward and presents the security which is the subject of the action, then the respondents clearly are correct in advancing their rights under Rule 75. If, on the other hand, the process is not so much identification as the establishment of a complete, independent cause of action, then the appellant will succeed. It is not enough, in order to come within Rule 75, simply to be able to string together a series of similar claims against a common defendant.

The procedure now proposed necessarily entails the assignment to the master of the task of trying up to 4,932 claims which might be advanced by each of the persons who acquired and held at the time of this action one of these automobiles. At least, therefore, the master will conduct a lengthy series of hearings to determine the facts with reference to each applicant for inclusion in the group purported to be represented by the respondents. The master in his report would be required to make a recommendation, or even a finding subject to confirmation, with reference to:

(a) the circumstances in which the automobile in question was acquired with particular reference to the advertising by the appellant; and

(b) the damages suffered by the applicant by reason of the purchase of this automobile, limited of course by the pleadings to $1,000.

Practical problems of all sorts spring up on all sides of this action when one contemplates the trial thereof, particularly the damage assessment process. Some owners may have purchased their car for infinite retention. No doubt such purchasers are still entitled to claim something for reduced potential trade-in value in the event of death, etc., but is that entitlement less than the entitlement of a person who purchased the car for retention for a period of two or three years followed by a trade-in on a new vehicle. Some buyers will have been able, and others unable, to rectify the particular defects in their Firenza. The trade-in market for these cars may be found to vary from region to region throughout the country. Some buyers may trade the car for a very expensive vehicle and suffer less financial loss than the owner who trades his vehicle in on the purchase of a small or sub-compact automobile. The range of circumstances which may be found to exist between owners is almost infinite. In the assessment of these

damages, all the techniques and machinery of the adversarial system will come into play. Considerable doubt must arise as to the economy of time and resources of the litigant and of the state which provides the facilities, which will be achieved by a representative action as compared to individual trials conducted, perhaps, in sequence, or in geographically convenient locations.

The rules of court do not contemplate access to the procedures of discovery, production and pre-trial processes by non-parties or by parties against non-parties. Nor do the rules make provision for such procedures in connection with referred hearings by a referee or master. Any review of the master's report by the trial judge would of course be from the transcript or record produced before the master, and it is difficult to equate such a review with a trial *de novo* where the tribunal of fact sees the witnesses examined under examination and cross-examination.

Then there is the question of costs. The rules make provision for the award of costs to parties and against parties but no authority is granted to the courts to assess costs against persons who are not parties. The difficulty with a class action in this regard is that until a member of the group is awarded the status of a party by being a representative or being amongst the represented, such person does not come within the purview of the court's authority with respect to costs, that is either to pay or receive costs. Consequently, where the appellant or a litigant in like position is put to the active defence of several thousand claimants for membership in the class, there would appear to be no authority in the court to award costs against the unsuccessful claimants. Neither party was able to indicate any provision in the rules appropriate to this aspect of the proceeding.

There is a further and considerable problem relating to the loss of right in the owners embraced in the alleged class to damages in excess of the $1,000 claimed in the statement of claim under what I have referred to as the "Carlill" contract. As was pointed out by counsel for the appellant, there may in some instances be persons who became owners of one of these automobiles under circumstances covered by the revised pleadings authorized by the Court of Appeal, who may allege personal injuries suffered by reason of and related to one or more of the alleged deficiencies of the automobile. If the effect of the ultimate judgment in this class action is *res judicata* on all rights of all members of the class with respect to the acquisition of a Firenza automobile, the result would be serious in such a circumstance. The operation of the defence of *res judicata* has a long history in our courts, and no

authority was drawn to the attention of the court wherein a court ignored such a plea in the case of a class action. It is true that there is a discretion in the courts where the defence of *res judicata* is raised, but such a discretion must be very limited in application. This court determined in *Cahoon v. Franks* (1967), 63 D.L.R. (2d) 274, [1967] S.C.R. 455, 60 W.W.R. 684, that all damages arising out of the same negligent act must be asserted by the claimant in the one action, and any subsequent action was barred by the doctrine of *res judicata*. The fact that harsh results follow the application of the doctrine has not deterred its application by the courts: *vide Cox v. Robert Simpson Co. Ltd. et al.* (1973), 40 D.L.R. (3d) 213, 1 O.R. (2d) 333 (Ont. C.A.). Rule 75 is silent as to the issue, and, failing some specific provision by statute, regulation or otherwise, the defence of *res judicata* would continue to apply. The fact that the action may be in contract of one kind or another would appear to represent no basis for the selective application of the defence of *res judicata*. If the courts were to adopt a principle whereby class actions estopped participants from future action only to the extent of claims made in the class action, one of the root purposes of the class action would be defeated. The inherent benefit of the representative action sadly produces this serious side effect. This is no doubt the most important factor which excited legislators elsewhere to action in defining and describing this action and its conduct.

This leads one to consider whether the purchasers of these cars would not still have rights flowing from the formal contract of purchase and the warranties and covenants contained therein. I refer to the contract between the automobile dealer and the member of the group. These, of course, may be statute-barred depending on the terms of the contract and the application to it of the Statute of Limitations of Ontario, but if this matter had been brought on expeditiously, or if for some reason the claims are not statute-barred, such a consideration would be serious indeed. What purpose would be served, for example, if one had an enforceable contractual claim under the formal contract of purchase, by proceeding at the same time but independently of an action under Rule 75? These are some of the principal difficulties which immediately crop up when an action of the type framed in this statement of claim is launched in reliance upon Rule 75 in its skeletal form.

There is, however, another side to the coin. These claims are all very small and are particularly small when ranged along side of the legal expenses to be incurred in today's market upon the

assertion of such a claim. Furthermore, the cost of demonstration of the violation of the alleged unilateral contract by engineering, market and other evidence with reference to damages suffered, would be extensive and expensive. Again all of this would have to be mounted and paid for in each individual claim, which might mean 4,532 claims. If the court were now to find that these claims may not be processed under Rule 75 it may mean, in practical terms, the end to many claims which, mathematically at least, may amount to about five million dollars. Furthermore, having regard to the practices in the modern market-place, particularly in national merchandizing of products such as automobiles, it is not an unreasonable risk that the vendor undertakes if he is now found to be exposed to class actions by dissatisfied purchasers. Indeed it is almost an anticipated cost of doing business in today's community. These, of course, are matters of policy more fittingly the subject of scrutiny in the legislative rather than the judicial chamber. The only application most of these considerations can properly have in the judicial process is in the determination of the proper construction of Rule 75. However, it is not a simple case, the respondents' submissions to the contrary, of placing upon Rule 75 a "liberal" interpretation. The rule in many instances will apply to transactions whereunder the purveyor of goods and services is brought to account by the consumer thereof. There may be some policy considerations as to whether the rule should be read to favour or protect the one or the other. But that again, in my view, is a legislative consideration. The sole duty of the court is to ascertain the proper interpretation by the application of the canons of construction to the words adopted by the maker of the rule and its application to these proceedings.

The respondents, however, may be at least partially correct when their counsel urges that it is the judgment or the proceeds of the action in which the plaintiffs must have the same interest. In the context of a conventional class action this would mean the same generic interest being shared amongst the plaintiffs and their constituents so as to entitle each of them to some indeterminate share of the defined or to be defined property, fund or pool. It does not follow, in my view, that the interest which must be the same or identical relates to some physical object which is the subject of the contest. I would not read Rule 75 so narrowly as to require all members of the plaintiff group to have the same property interest in the same vehicle or to have a share of a vehicle. The term "interest", in my view, is not to be so narrowly read. On the other hand, it is equally clear from the terms of Rule

75 itself and the context in which it appears in the Rules of Practice that it is not enough that the group share a "similar interest" in the sense that they have varying contractual arrangements with the appellant which give rise to different but similar claims in contract relating to the same model of automobile. No doubt the claims are similar and they might even be the same in the classification of contract claims, but it does not necessarily follow that all such claims under similar but not identical contracts will have "the same interest" in a contract right or the subject of a contract arising between the appellant and the respondents in the sense of Rule 75. For example, some members of the class may have seen some but not all of the appellant's advertisements. Some may have made inquiries of the appellant or its representatives. Others may have seen all the public releases in question and made no inquiries of anyone. Indeed it is difficult to extend the rule beyond that conventional class action where the contest concerns a discernable fund or asset, and only two things remain to be determined, firstly, the right in the plaintiffs to the asset in whole or in part, and secondly, the right of the individual members of the plaintiff class to a part of the class's total entitlement.

It seems clear to me that the purpose of Rule 75 was not to impose upon the general pattern of procedure established by all the Rules of Court a new and distinct method of proceeding which does not fit into the provisions already made for the conduct of actions in the Supreme Court. If such were the case, one would expect to find in the rules extensive provisions supporting the conduct of such a novel claim now said to have been created by Rule 75.

One serious consideration left entirely open by Rule 75, by its silence on the subject, is, what is the effect of the Statute of Limitations on the commencement of an action under Rule 75 which is later found improper by the courts? There is apparently no Canadian authority on the question. If the statutory period has expired by the time the action is found to lie outside Rule 75, then the claim of those persons up to that point represented by the action of the plaintiffs would be barred by the Statute of Limitations unless the courts found the law to be that the purported representation did in law institute the action of those represented within the time prescribed by statute. This is the result reached in the United States in such cases as *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, a decision of the United States Supreme Court in 1974. The court there found that the operation of the limitations statute was suspended by the institution of the

class action, albeit later found to have been improperly instituted in the sense that the claims did not lend themselves to prosecution through representative proceedings. The result is somewhat artificial in that it would preserve the rights of members of the alleged class, even though they were unaware of the class action. No doubt such a general proposition is exposed to abuse on occasion. This undoubtedly requires legislative intervention in this country, and is but a further illustration of the need for a comprehensive legislative scheme for the institution and conduct of class actions.

It is unfortunate that this proceeding reaches this court some eight years after its inception. The plaintiffs have been put to considerable expense in the meantime. Their rights under this type of action or under general contract action of purchase have no doubt decayed and even gone out of existence in some instances by operation of limitation legislation. All of these circumstances, however unfortunate, do not relieve us of the duty of determining the correct meaning of Rule 75 and its proper application in these circumstances.

It is my conclusion that the rule, consisting as it does of one sentence of some thirty words, is totally inadequate for employment as the base from which to launch an action of the complexity and uncertainty of this one. For these reasons, therefore, I would conclude that the action may not be framed as a class action under Rule 75, but must proceed as a joined action brought by the several named plaintiffs against the defendant-appellant. In the light of the long history of this litigation and the difficulties encountered by the respondents, there will be no order as to costs in this court.

Appeal allowed.

RE FEDERAL BUSINESS DEVELOPMENT BANK AND BRAMALEA LTD.

Ontario High Court of Justice, Callaghan J. February 24, 1983.

Personal property security — Chattel leases — Lessee agreeing to pay rent for period of time and then to buy chattels for agreed sum approximating their undepreciated value — Whether transaction in substance creating a security interest — Personal Property Security Act, R.S.O. 1980, c. 375, s. 2(a).

Respondent carried on the business of renting automobiles. It rented vehicles to a building contractor on terms whereby the lessee made a series of monthly payments, and then agreed to purchase the vehicles on payment of sums calculated to approximate their undepreciated value. The lessee bore insurance and maintenance costs. The agreements were not registered under the *Personal*