2007 SKQB 247
Saskatchewan Court of Queen's Bench

Brooks v. Canadian Pacific Railway

2007 CarswellSask 387, 2007 SKQB 247, [2007] 11 W.W.R. 436, [2007] S.J. No. 367, 160 A.C.W.S. (3d) 220, 283 D.L.R. (4th) 540, 298 Sask. R. 64

William Brooks, Sam Kinert, Rob Peter, Glenn Stepp, Lorraine Supple, Bill Wiechert, John Doe 1, Jane Doe 2, Jane Doe 1, Jane Doe 2, Plaintiffs and Canadian Pacific Railway Limited and Canadian Pacific Railway Company, Defendants

C.L. Dawson J.

Judgment: July 11, 2007
Docket: Regina Q.B.G. 1617/04

Counsel: E. F. Anthony Merchant, Q.C., for Plaintiffs
Robert W. Leurer, Q.C., Michael J. Phillips, for Defendants

Subject: Civil Practice and Procedure; Torts; Contracts

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Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Six cars derailed off lines owned by national railway company ("company") — Five of derailed cars carried ammonia, but none escaped — Derailment did not cause any physical injury and only company's property was damaged — Area around derailment was evacuated — Plaintiffs brought suit against company based on negligence, strict liability, assault, and illegal contract — Plaintiffs alleged, in part, that company's breach of duty of care caused such harm as economic loss, stress and worry — Company set up claims centre, paying amounts to claimants in return for signed release ("settlement agreements") — Plaintiffs brought application to certify action as class proceeding — Application dismissed — Pleading failed to disclose any reasonable cause of action — No cause of action in negligence for interference with psychological integrity, stress or worry — Claim did not fall within, nor was it analogous to, category of cases where duty of care has been recognized for nervous shock — Expanding duty of care was not appropriate — While it may have been foreseeable that those next to derailment would suffer from evacuation, it was doubtful that sufficient proximity existed to those on perimeter of evacuated area and those who were not evacuated but prevented from returning — Foreseeability and proximity aside, policy considerations militated against expanding duty of care — Compensating for stress and worry would expand scope of tort and may create indeterminate liability — No cause of action in negligence for economic loss — Attempt to classify loss of use and enjoyment of property as property damage was unsupportable; plaintiffs' loss was purely economic — Case did not pose exception to rule denying recovery in tort for pure economic loss — It was not alleged that defendants had contract with third party for transport of ammonia, or that plaintiffs were incidental beneficiaries of such contract — It was not alleged that there was physical or property injury to third party and that plaintiffs suffered loss because of relationship with third party — Even if claim was for relational economic loss, it did not fit under one of exceptions to rule denying recovery for such loss — It was not alleged that plaintiffs were cargo owners, had possessory interest in train, and/or were in joint venture with company — Although harm was foreseeable, no relationship alleged that would support relational proximity — Foreseeability and proximity aside, indeterminate liability barred imposing new duty of care for economic loss.

Torts --- Negligence — Strict liability (rule in Rylands v. Fletcher) — General principles — Escape

Six rail cars derailed off lines owned by national railway company ("company") — Five of derailed cars carried ammonia, but none escaped from cars or lands — Derailment did not cause anyone physical injury and only company's property was damaged — Area around derailment was evacuated, affecting about 175 individuals and/or businesses — Plaintiffs brought suit against company based on common law causes of action in negligence, strict liability given Rylands v. Fletcher rule, assault, and illegal contract — Company set up compensation claims centre, paying amounts to claimants in return for signed final release — Plaintiffs brought application to certify action as class proceeding pursuant to s. 6 of The Class Actions Act — Application dismissed — Pleading failed to disclose any reasonable cause of action — In particular, there was no cause of action based on Rylands v. Fletcher rule — Pleading did not allege that ammonia or rail cars escaped, as required, or that damage was caused to plaintiffs' property or person as result of escape, as required — Interference with plaintiffs' right of access to property was pure economic loss, which was not covered by Rylands v. Fletcher rule.

Contracts --- Illegal contracts (substantive validity) — General principles

Applicability of doctrine of illegality — Six rail cars derailed off lines owned by national railway company ("company") — Five of derailed cars carried ammonia, but none escaped — Derailment did not cause anyone physical injury and only company's property was damaged — Area around derailment was evacuated, affecting about 175 individuals and/or businesses — Plaintiffs brought suit against company based on common law causes of action in negligence, strict liability given Rylands v. Fletcher doctrine, assault, and illegal contract — Company set up compensation claims centre, paying amounts to claimants in return for signed final release ("settlement agreements") — Plaintiffs brought application to certify action as class proceeding pursuant to s. 6 of The Class Actions Act ("Act") — Application dismissed — Pleading failed to disclose reasonable cause of action — In particular, there was no cause of action for illegal contract — No allegation in pleading of breach of contract, and absence of such removed illegality doctrine as potential cause of action — Allegation that settlement agreements were in breach of statutory duty imposed by Act was rejected — No specific breaches of Act were pled — Proceeding under Act did not alter application of illegality doctrine given that Act is procedural, not substantive statute — No authority for proposition that settlement agreements were contrary to integrity of solicitor/client relations and therefore injurious to public good.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Six rail cars derailed off lines owned by national railway company ("company") — Five of derailed cars carried ammonia, but none escaped from cars or lands — Derailment did not cause anyone physical injury and only company's property was damaged — Area around derailment was evacuated, affecting about 175 individuals and/or businesses — Company set up compensation claims centre, paying amounts to claimants in return for signed final release — Plaintiffs brought suit against company based on common law causes of action in negligence, strict liability given Rylands v. Fletcher doctrine, assault, and illegal contract — Proposed class included residents, property owners, business owners and employees who were evacuated or prevented from entering area and suffered stress, worry and/or inconvenience, or financial loss as result ("economic loss and stress claims") — Proposed subclass included those who submitted compensation claim and signed final release ("compensation agreements") — Plaintiffs brought application to certify action as class proceeding pursuant to s. 6 of The Class Actions Act — Application dismissed — Pleading failed to disclose reasonable cause of action — If cause of action was disclosed, proposed class definition provided objective basis by which members could be identified with respect to economic loss and stress claims — Geographical parameters coupled with requirement that persons were evacuated or prevented from entering or returning to evacuated area and that they were making claim would enable court to determine whether person was class member — Similarly, proposed definition of subclass provided objective basis for subclass — However, objective criteria was not sufficient to establish properly identifiable class in relation to compensation agreements — There was evidence of some people who were evacuated or could not return and incurred expenses and income loss, one person who was worried and another claiming for loss of use of property — However, there was no evidence of any person claiming that they were deprived of their legal interests due to compensation agreements, or that there was class of more than one person who shared common claim pursuant to these agreements.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Six rail cars derailed off lines owned by national railway company ("company") — Five of derailed cars carried ammonia, but none escaped from cars or lands — Derailment did not cause anyone physical injury and only company's property was damaged — Area around derailment was evacuated, affecting about 175 individuals and/or businesses — Plaintiffs brought suit against company based on common law causes of action in negligence, strict liability given Rylands v. Fletcher doctrine, assault, and illegal contract — Plaintiffs alleged, in part, that company breached duty of care and caused such harm as interference with property rights, economic loss, stress, worry, inconvenience and apprehension of imminent harm — Company set up compensation claims centre, paying amounts to claimants in return for signed final release — Plaintiffs brought application to certify action as class proceeding pursuant to s. 6 of The Class Actions Act — Application dismissed — Pleading failed to disclose reasonable cause of action — If cause of action was disclosed, number of proposed issues raised common issues — Derailment, whether company breached its legal duties, strict liability and damages incurred, could be common issues — However, damages for stress and worry, whether defendants owed duty to persons outside evacuated area, and whether additional compensation could be paid to those who signed final release, were not common issues.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Six rail cars derailed off lines owned by national railway company ("company") — Five of derailed cars carried ammonia, but none escaped from cars or lands — Derailment did not cause anyone physical injury and only company's property was damaged — Area around derailment was evacuated, affecting about 175 individuals and/or businesses — Plaintiffs brought suit against company based on common law causes of action in negligence, strict liability given Rylands v. Fletcher doctrine, assault, and illegal contract — Company set up compensation claims centre, paying amounts to claimants in return for signed final release — Plaintiffs brought application to certify action as class proceeding pursuant to s. 6 of The Class Actions Act — Application dismissed — Pleading failed to disclose reasonable cause of action — If cause of action was disclosed, class action would be preferable procedure in relation to some of common issues — Class action would be preferable regarding why cars derailed, proof of hotel and food expenses, and loss of wages incurred — Issues related to claims of stress and worry and those who received compensation and signed release, would not be amenable to class procedure as they would require significant inquiry into circumstances of each claimant.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Fair and adequate representation

Six rail cars derailed off lines owned by national railway company ("company") — Five of derailed cars carried ammonia, but none escaped — Derailment did not cause anyone physical injury and only company's property was damaged — Area around derailment was evacuated, affecting about 175 individuals and/or businesses — Company set up compensation claims centre, paying amounts to claimants in return for signed release — Plaintiffs brought suit against company based on common law causes of action in negligence, strict liability given Rylands v. Fletcher doctrine, assault, and illegal contract — Proposed class included those residents, property owners, business owners and employees, who were evacuated or prevented from entering area and suffered stress, worry and/or inconvenience, or financial loss as result ("economic loss and stress claims") — Proposed subclass included those who submitted compensation claim and signed final release ("compensation agreements") — Plaintiffs alleged, in part, that company breached duty of care and caused such harm as interference with property rights, economic loss, stress, worry, inconvenience and apprehension of imminent harm — Plaintiffs brought application to certify action as class proceeding pursuant to s. 6 of The Class Actions Act — Application dismissed — Pleading failed to disclose reasonable cause of action — If cause of action was disclosed, none of representative plaintiffs named in pleading would be appropriate — With one exception, none of representative plaintiffs filed affidavit or were prepared to serve as representative — With one exception, none of named representative plaintiffs were proposed by counsel as representative plaintiff — Proposed representatives ("C, S and B") were also not appropriate — Unsatisfactory evidence that any of proposed representatives were directing litigation or would fairly and adequately represent interests of class — C was not named in claim and there was no evidence that he fell within scope of proposed class or subclass — No need to appoint C as non-class member as representative in order to avoid substantial injustice — S was not person who would vigorously prosecute claim or be appropriate person to assume fiduciary obligation — B did not set out any evidence that he had knowledge, involvement or experience to properly instruct counsel, that he had financial ability to proceed with litigation and knew how he would manage costs of class litigation.

Table of Authorities

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Statutes considered:

Class Actions Act, S.S. 2001, c. C-12.01

Generally — referred to

s. 2 "class" — considered

s. 2 "common issues" — considered

s. 4(4) — referred to

s. 6 — pursuant to

s. 6(a) — considered

s. 6(b) — considered

s. 6(c) — considered

s. 6(d) — considered

s. 6(e) — considered

s. 7(2) — referred to

s. 9 — considered

Mortgage Brokers Act, R.S.B.C. 1996, c. 313

Generally — referred to

Rules considered:

Queen's Bench Rules, Sask. Q.B. Rules

R. 173(a) — referred to

APPLICATION by plaintiffs for certification of train derailment action as class action pursuant to s. 6 of *The Class Actions Act*.

***C.L. Dawson J.*:**

1 This is an application for certification of an action as a class action pursuant to s. 6 of *The Class Actions Act*, S.S. 2001, c. C-12.01. The claim arises out of a Canadian Pacific Railway train derailment in the City of Estevan, Saskatchewan, on August 8, 2004. The members of the proposed plaintiff class are residents, property owners, lessees of property and/or employees of businesses who were evacuated as a result of the derailment from a designated area in Estevan.

Introduction

2 I intend to set out the background facts to put the certification application in context. It must be kept in mind that a certification application is not a determination on the merits, as confirmed by s. 7(2) of the CAA. None of the facts which I set out here are yet proven. It is useful, however, to understand the background. The background in this case is found in the affidavit evidence of the parties, the pleadings and, to some extent, the submissions of counsel.

3 On Sunday, August 8, 2004 a train derailment took place in Estevan, Saskatchewan on rail lines owned and operated by Canadian Pacific Railway Company ("CP Rail"). The derailment was a low-speed train derailment, which occurred while a railway crew was backing rail cars onto a secondary branch line. Six rail cars came off the line. At the time of the derailment the cars were travelling at about 9 mph. The derailment occurred near downtown Estevan.

4 Of the six derailed cars, five contained anhydrous ammonia. Three of these railcars tipped on their side. There was no damage to property, other than to CP Rail's own property in the immediate vicinity of the derailment. There was no escape of anhydrous ammonia from CP Rail's cars or lands. The rail cars did not leave CP Rail property.

5 Estevan city officials decided to evacuate the area around the derailment. The evacuation affected about 175 individuals and/or businesses. The evacuation was co-ordinated by the Estevan Police Department. The police and local

radio informed people of the evacuation and advised evacuees to report to an emergency response centre established in the local leisure centre. The emergency response centre was staffed by the Red Cross, Salvation Army and other volunteers, who offered services to evacuees. Evacuees who needed accommodations were provided lodging at a local hotel. In addition, meals were available to evacuees during the evacuation period.

6 During the period of the evacuation, CP Rail began to clean up the site, including emptying the tanker cars of their product. This involved transferring the anhydrous ammonia to tanker trucks. No person suffered physical injury as a result of the derailment. No person or business, other than CP Rail, suffered property damage as a result of the derailment.

7 On the day of the derailment, August 9, 2004, CP Rail representatives arrived in Estevan to begin processing claims for compensation for economic losses allegedly suffered by evacuees.

8 The period of evacuation began around 2:00 p.m. on Sunday, August 8, 2004 and ended at about 10:00 a.m. on Tuesday, August 10, 2004. The period of evacuation was about 44 hours. The actual period of time that individuals were affected by the evacuation varied from person to person. Estevan city officials lifted the evacuation order on August 10, 2004 after being advised by CP Rail officials that the derailed cars were upright and inspected.

9 That same day, August 10, 2004, the statement of claim in this action was issued. The proposed plaintiffs were "William Brooks, Sam Kinert, Rob Peter, Glenn Stepp, Lorraine Supple, Bill Wiechert, John Doe 1, Jane Doe 2, Jane Doe 1, Jane Doe 2". The defendants were "Canadian Pacific Railway Limited and Canadian Pacific Railway Company".

10 On August 13 and 14, 2004, a CP Rail claims centre was set up in Estevan. CP Rail representatives met with individuals making claims for compensation at the claims centre. CP Rail processed many claims for compensation and paid amounts to claimants. The compensation was only paid to claimants if they signed a "Final Release" form. The Final Release stated that the claimant released CP Rail from all claims arising out of "A train derailment on ... August 8, 2004 and any business interruption as a result of an evacuation order...."

11 On September 9, 2004 the plaintiffs filed an amended statement of claim in this action.

12 On September 22, 2004 the plaintiffs' counsel advised the defendants' counsel, by letter, a copy of which was sent to the Court, of the following:

> Two of the representative plaintiffs indicated that they do not want to continue as representative plaintiffs. Whether we substitute others or not remains to be seen but I will, at some early opportunity, when before the Court in any event, remove their names as representative plaintiffs.

The plaintiffs' counsel did not identify which two named representative plaintiffs did not want to continue as representative plaintiffs.

13 In February 2005, the plaintiffs brought a notice of motion, which motion was returnable at a time to be set by the court, for the hearing of the application to certify the action as a class action. However, no date was set for the certification application by the court at that time because the plaintiffs were not ready to proceed with the certification application.

14 On May 6, 2005, the defendants brought a preliminary motion to strike William Brooks, Sam Kinert, Rob Peter, Bill Wiechert, John Doe 1, John Doe 2, Jane Doe 1 and Jane Doe 2 as named plaintiffs in this action, or, in the alternative, to require the proposed representative plaintiffs to be produced for examination for discovery. At the hearing of the defendants' motion to strike the representative plaintiffs, counsel for the plaintiffs indicated that Rob Peter did not wish to be a plaintiff in the action. The defendants' motion to strike the named plaintiffs was reserved.

15 On June 8, 2005, the plaintiffs filed a second amended statement of claim.

16 On August 24, 2005, counsel for the plaintiffs confirmed, by letter in writing addressed to the court, that Rob Peter should be removed as a plaintiff. Plaintiffs' counsel indicated in that letter that Mr. Peter's counsel would seek an order removing him from the proceedings at some point.

17 In 2006, almost a year after filing the notice of motion to certify the action, the plaintiffs proceeded with the application for certification.

18 At the hearing of the application for certification, counsel for the plaintiffs sought to have Nick Cunningham named as the representative plaintiff. Nick Cunningham was not named in the amended amended claim as a representative plaintiff. Plaintiffs' counsel submitted further, that if the court did not find Nick Cunningham to be within the class, he sought Glenn Stepp as the representative plaintiff. Glenn Stepp was named in the claim. Plaintiffs' counsel submitted that if Glenn Stepp was not appropriate as a representative plaintiff, then Eugene Babychuk should be named the representative plaintiff. Eugene Babychuk was not named as a representative plaintiff in the amended amended statement of claim.

19 The defendants have not yet filed a statement of defence.

20 The defendants take the position that the plaintiffs' application for certification should be dismissed. The defendants assert: that the claim does not disclose any cause of action; that there is no identifiable class; that a class proceeding is not the preferable procedure; and, that there is no adequate representative plaintiff.

21 Counsel on behalf of the parties have continued, since the hearing of the certification application, to file material which they sought to bring to the court's attention for consideration on the certification issues.

Application for Certification

22 The plaintiffs bear the burden of establishing that the action should be certified as a class proceeding, based on the criteria outlined in *The Class Actions Act*, S.S. 2001, c. C-12.01 (the "CAA"). The criteria for certification of an action as a class action are set out in s. 6 of the CAA, as follows:

> **6** The court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class;
>
> (c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;
>
> (d) a class action would be a preferable procedure for the resolution of the common issues; and
>
> (e) there is a person willing to be appointed as a representative plaintiff who:
>
> (i) would fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

23 The Supreme Court of Canada has issued three decisions which have guided the development of class actions in Canada: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158, 205 D.L.R. (4th) 19 (S.C.C.); and *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 (S.C.C.). In *Hollick*, *supra*, McLachlin C.J.C. speaking for the Supreme Court of Canada at paragraphs 14 and 15 stated that class action legislation should be construed generously and that an overly restrictive approach must be avoided to realize the benefits of the legislation as foreseen by its drafters, namely serving judicial economy, enhancing access to justice and, encouraging behaviour modification by those who cause harm. Justice McLachlin also emphasized that the certification stage is not meant to be a test of the merits of the action, but rather focuses on the form of the action. At paragraph 16 she stated: "The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action." It is against this backdrop that the issues of certification must be considered.

A. Statutory Requirement 1:

— Is the Court Satisfied that the Pleadings Disclose a Cause of Action?

General Considerations

24 Subsection 6(a) of the CAA provides that on an application for certification the court must be satisfied that the pleadings disclose a cause of action. The onus is on the plaintiffs to establish that the pleadings disclose a cause of action. It is also well-established that on an application for certification a court will determine whether the pleadings disclose a cause of action solely on the basis of the pleadings. (*Hoffman v. Monsanto Canada Inc.*, 2005 SKQB 225, 264 Sask. R. 1 (Sask. Q.B.) (certification decision); *May v. Saskatchewan*, 2006 SKQB 145, [2006] 9 W.W.R. 89 (Sask. Q.B.)).

25 The Saskatchewan Court of Appeal very recently had an opportunity to address the issues respecting an application to certify a class action in *Hoffman v. Monsanto Canada Inc.*, 2007 SKCA 47, [2007] S.J. No. 182 (Sask. C.A.) (appeal decision). The Saskatchewan Court of Appeal upheld the decision of Smith J. (as she then was) in *Hoffman v. Monsanto Canada Inc.* (certification decision). Justice Smith refused to certify the action as a class action on the basis that the application did not meet all of the criteria in s. 6 of the CAA. While the Saskatchewan Court of Appeal addressed all of the requirements of s. 6 of the CAA, it paid particular attention to the criterion under s. 6(a) of whether the pleadings disclosed a cause of action. The Court of Appeal noted that *Hoffman v. Monsanto Canada Inc.* (certification application) had resorted to the "plain and obvious test", as had many other certification decisions, a test traditionally associated with an application to strike pleadings brought under Rule 173(a) of *The Queen's Bench Rules of Court*. Rules such as 173(a) empower the courts to strike out a pleading as failing to disclose a cause of action. Justice Cameron of the Saskatchewan Court of Appeal concluded that the plain and obvious test is not an appropriate test on a certification application. Justice Cameron's rationale is discussed at paras. 33 through 44 of the appeal judgment, and I repeat it as it puts the standard to be applied on a certification application in context:

> ¶33 We are of the opinion that she cannot be said to have adopted an excessively rigorous approach. Indeed, the "plain and obvious test", which bears heavily in favour of the pleadings disclosing a cause of action, is of questionable application to section 6(a). This is especially so of the embellished version of the test, so even if the test should be taken to apply, notwithstanding what was said of the matter by the Supreme Court of Canada in *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534 at pp. 556-557, the embellishments should be left aside. This is so because much of the gloss put on the test can be misleading.
>
> ¶34 It can be misleading, for example, to simply say the test does not amount to a "preliminary merits test". True. section 6(a) does not require an applicant for class action certification to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class." This particular "preliminary merits test" was once proposed in relation to legislation of this nature, only to be rejected in favour of the simple requirement that the pleadings disclose a cause of action. (See, *Hollick v. Toronto (City)*, [2001]

3 S.C.R. 158 at p. 170). In consequence, section 6(a) is not to be seen as requiring an applicant for certification to verify the facts as pleaded, by affidavit or otherwise. Instead, the facts as pleaded are to be taken at face value. In this sense, confined to the factual merit of the cause of action, it is true that section 6(a) does not envision subjecting the pleadings to a "preliminary merits test".

¶35 But that is about as far as one can go with this notion, for it remains necessary under section 6(a) for a judge to be satisfied that the pleadings disclose a cause of action. This must mean it remains for the judge, having accepted at face value the *facts* as pleaded, to be satisfied the facts as pleaded give rise to a cause of action in *principle*, for these are the two fundamental components of a cause of action. It has become clear in light of *Cooper v Hobart*, [2001] 3 S.C.R. 537, and *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, that the likes of section 6(a) allow for testing the basis in principle of the cause of action. In this sense, which has to do with merit in principle as distinct from fact, it is not accurate to say that section 6(a) does not envision subjecting the pleadings to a preliminary merits test.

¶36 *Cooper* and *Edwards* make it equally clear that the likes of section 6(a) are not to be regarded as precluding inquiry into "novel claims" when confronted with the issue of whether the pleadings disclose a cause of action. The legal novelty or complexity of a claim is not to be seen as standing in the way of such inquiry, nor seen to preclude a determination that the pleadings do or do not appear to disclose a cause of action.

¶37 Nor is it particularly helpful to say that section 6(a) posits a "very low threshold", unless by this is meant that it is not difficult for competent counsel to plead an authentic cause of action, and plead it appropriately in accordance with the rules and purposes of pleading. If this expression is meant to convey some further notion, however, it too can be misleading, for it can be taken to suggest that section 6(a) is to be applied with little if any vigour even in relation to principle. Again, *Cooper* and *Edwards* demonstrate that this is not so, for the basis in principle underlying the pleadings in those cases was vigorously examined, and the causes of action were found on the face of them to be lacking legal merit.

¶38 Then there is the added gloss supplied by the supposed need to take a "generous" and "accommodating" view of the pleadings. The rationale for this is difficult to fathom, bearing in mind: (i) that the facts as pleaded are assumed to be true; (ii) that the pleadings are open to proper amendment; (iii) that the elements of a cause of action are a matter of law; and (iv) that the task at hand is to inquire into whether the facts as pleaded appear to give rise in law to the cause or causes of action relied upon. As Justice Smith aptly observed, this permits the court to "evaluate the legal basis of the plaintiffs' claim on the most optimal view of the facts, presupposing the plaintiffs have, in the pleadings, stated their factual case at its highest." More is not required.

¶39 To all of this is added the further gloss that the defendant must show, plainly and obviously and "beyond doubt", that the action "could not succeed." This despite the repeated statement that the "plain and obvious test", as it applies to the likes of Rule 173, also applies to the likes of section 6(a), but with this difference: When it comes to the latter, the onus is on the applicant as representative plaintiff to show that the pleadings disclose a cause of action, not on the defendant to show otherwise. Obviously, there is something amiss here, something requiring explanation. But, while it is often said that the "plain and obvious test" applies to the likes of section 6(a), subject to this difference, the difference is rarely explained, and the explanation is difficult. Indeed, it serves to cast doubt on the propriety of bringing this test to bear on the application of section 6(a).

¶40 The difficulty flows from the fact the "plain and obvious test", as it applies to Rule 173, comes to bear upon a *negative* proposition: the pleadings do *not* disclose a reasonable cause of action or defence as the case may be. And the test posits a standard against which that proposition falls to be addressed. Thus a defendant who applies under Rule 173 to strike out a pleading bears the burden of satisfying the judge that the pleadings plainly and obviously do not disclose a reasonable cause of action.

¶41 But what about a representative plaintiff who applies for the certification of a class action and must satisfy the judge that the pleadings disclose a cause of action as required by section 6(a)? Here the complexion of the matter changes, for the test is brought to bear upon a *positive* proposition: that the pleadings *do* disclose a cause of action. Does this mean the representative plaintiff has to satisfy the judge that the pleadings plainly and obviously disclose a cause of action? Not according to the cases. Still, the cases state that the "plain and obvious test" applies. And still, they state that the onus is on the representative plaintiff to show that the pleadings disclose a cause of action, not on the defendant to show otherwise.

¶42 There seems no way to reconcile this conflicting state of affairs short of recognizing that the true import of bringing the "plain and obvious test" to bear on section 6(a) is to create a presumption in favour of the pleadings disclosing a cause of action, a rebuttable presumption open to rebuttal by the defendant, not on the basis of fact, but on the basis the pleadings plainly and obviously do not disclose a cause of action in principle. Which raises the question of whether such a presumption was intended by the Legislature.

¶43 It is clear from the historical development of class action legislation that the Legislature did not intend to saddle an applicant for certification with the burden of demonstrating, by affidavit or otherwise, a reasonable possibility that the facts as pleaded will be resolved in favour of the representative plaintiff at trial. Were it otherwise, the Legislature would have opted for a "preliminary merits test" in relation to fact. To that extent, which is to say to the extent the "plain and obvious test" posits a presumption that the facts as pleaded are capable of proof, the test may be fitted to the application of section 6(a), though it is unnecessary to have resort to the test for this purpose. It is enough to construe section 6(a) to this effect, having regard in particular to the historical development of the legislation. In other words, the absence of a "preliminary merits test" in relation to fact is itself a sufficient indication of such legislative intent.

¶44 Beyond that, it becomes difficult to fit the "plain and obvious test" to the application of section 6(a), for it is difficult to conceive of the Legislature having intended to create a presumption in favour of the pleadings disclosing a cause of action in principle, as distinct from fact, a presumption capable of rebuttal only on a plain and obvious standard. Neither the nature and purpose of section 6(a), nor the overall purposes of the *Act* suggest such intention.

26 Justice Cameron then went on to state the analysis that is to be applied under s. 6(a) of the CAA of whether the pleadings disclose a cause of action:

¶45 Section 6 is essentially a screening mechanism, the purpose of which is to allow an action to proceed as a class action provided it is suitable for class action treatment. So far as the section extends to screening the *cause of action*, as contemplated by paragraph (a), it may be taken to be aimed at allowing an action to proceed as a class action provided the applicant for certification satisfies the judge that the class has what appears to be an *authentic* cause or causes of action. This is consistent with the purposes of the *Act*, which lie in improved access to justice, litigation efficiency, and modification of behaviour by wrongdoers. None of these purposes is served by allowing an action to proceed as a class action unless the class appears to have a genuine cause or causes of action. Indeed, the purposes are otherwise undermined.

¶46 That the pleadings disclose what appears to be a genuine cause of action takes on an added measure of significance in class action regimes that preclude an award of costs, as does the Saskatchewan regime. Section 40 of *The Class Actions Act* expressly precludes an award of costs on a class action except in the face of misconduct. The exception aside, the object of the section is to remove from this form of litigation the risk of an adverse award of costs in the event of failure. This is a significant financial risk, one which serves as a disincentive in relation to individual litigation. Obviously, the Legislature wanted to remove this risk, and this disincentive, from class actions, having regard for the overall purposes of the *Act* and their furtherance. Its removal can, however, serve as an incentive to the unscrupulous to commence less than genuine actions for the primary purpose of pressuring the defendant into a settlement, a settlement induced not by fear of being found to have engaged in any wrongdoing but by concern over

the enormous cost associated with class action litigation. There is an obvious need to guard against such mischief in the interests of furthering, not distorting, the purposes of the *Act*, and of maintaining respect for, and confidence in, the class action regime.

¶47 Given the nature and purpose of section 6(a) as a screening mechanism, designed to operate in a no-cost-recovery environment, it seems improbable that the Legislature should have intended to create not only a presumption that the facts as pleaded are capable of proof but also a presumption that the facts as pleaded give rise to a cause of action in principle-a rebuttable presumption open to rebuttal by the defendant but only on a plain and obvious standard. The first is readily appreciated. The second is more difficult to appreciate for the reason (additional to those already mentioned), that it has the effect of shifting the burden from the applicant, where it ordinarily lies, to the respondent, where it lies only exceptionally, and this without express provision to that effect in section 6.

¶48 It is well to bear in mind that section 6 clearly contains a set of preconditions to the certification of an action as a class action, preconditions that may be seen to be concerned with the apparent genuineness of the claim (as in paragraph (a)), and its suitability for class action treatment (as in paragraphs (b) to (e)). On the face of it, the section expects the applicant to meet these preconditions to the satisfaction of the judge, meaning the applicant bears the burden of persuading the judge that each of the preconditions has been met. It would be anomalous to suppose that this is so in relation to the preconditions found in paragraphs (b) through (e), but not so of the precondition found in paragraph (a).

¶49 This is not to say the burden regarding the requirement of paragraph (a) is onerous or otherwise. It is merely to say that it rests with the applicant barring deviation from the norm, but there is no indication in these provisions of an intention to deviate from the norm in relation to paragraph (a) but not paragraphs (b) though (e). Nor should it be thought, in light of the purposes of the *Act*, that this is expecting too much of the applicant, for the applicant has only to satisfy the judge that the class has an apparently authentic cause of action based on the facts as pleaded and the law that applies. Unless the applicant can satisfy the judge of this, who would say the action should be certified as a class action, and to what legitimate end?

¶50 **Understood in this light, we are of the opinion Justice Smith correctly identified the essential nature of the matter when she said that, assuming the facts as pleaded are true, the representative plaintiffs must persuade the court that there exists a plausible basis for supposing the defendants could be liable to the claims of the class. This is a way of saying, simply and effectively, that the representative plaintiff has to satisfy the judge that the pleadings disclose an apparently authentic or genuine cause of action on the basis of the facts as pleaded and the law that applies. This also has the advantage of restoring balance to the screening process so far as it extends to the cause of action.**

¶51 There is a similar way to express a similar idea. In Quebec, the court is called upon to authorize a class action by a representative plaintiff if the court is of the opinion the facts as alleged seem to justify the conclusions sought: Article 1003(b) of the *Code of Civil Procedure*, R.S.Q., c. C-25. This was taken by the Supreme Court of Canada, in *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, to require the judge to be satisfied that the action bears "a serious colour of right."

¶52 In other contexts, the law requires that a party asserting a certain position make out a "*prima facie*" case of right, or show that there is a "genuine case to be tried", or that the case has an "air of reality" about it in principle, before being entitled to have the case advanced in one way or another. These are all general expressions of a standard suitable to an occasion, a standard upon which a proposition falls to be addressed and determined. None are meant to serve as precise or exhaustive formulations. They are meant, instead, to set the tenor and tone of the matter.

¶53 **In the case of section 6(a) of *The Class Actions Act*, which calls upon a representative plaintiff to satisfy a judge that the class has an apparently authentic or genuine cause of action, there is in our judgment no more effective and balanced and functionally appropriate way of setting the tenor and tone of the matter than to expect the representative plaintiff**

> **to satisfy the judge that there exists a plausible basis in principle and presumed fact for supposing the defendants could be held liable.**
>
> ¶54 On the whole, then, we see no tenable basis for resort to the "plain and obvious test" in relation to section 6(a) of the Saskatchewan statute. The test might be resorted to for the limited purpose of supplying the presumption the pleadings disclose a cause of action in fact, as distinct from principle, but even then it serves no useful purpose, for the section itself falls to be so construed. In short, we think the test is best left to Rule 173, where it was designed to operate and where it has long operated effectively.
>
> [Emphasis added]

27 While I have quoted at length from the decision of Justice Cameron, the decision identifies the plaintiffs' obligation under this criterion and the basis and rationale for that obligation. It is clear in Saskatchewan that the plaintiffs must satisfy the court that they have an authentic or genuine cause of action. The plaintiffs must satisfy the court that there exists a plausible basis in principle and presumed fact for supposing that the defendants could be held liable.

28 Here, the defendants argue not so much that the existence of the cause of action presumed in the pleadings finds no legal support, as the plaintiffs have failed to plead facts to support a particular allegation essential to the cause of action alleged. This raises the question of whether the defect is merely a technical failure of pleading or more substantive — a question of whether the defect could even be cured by an amendment. Here the claim has already been amended twice. The plaintiffs' counsel did make a general submission, at the end of oral argument, that if the court did not find that the pleadings disclosed a cause of action, the plaintiffs should be allowed to amend the claim. However, plaintiffs' counsel did not suggest there were any alleged facts, additional to those articulated in the claim, that could be pled to fill in any alleged deficiencies. The procedure on a certification application presumes the facts as pleaded are true. This permits the court to evaluate the legal basis of the plaintiffs' claim on the most optimal view of the facts. I assume the plaintiffs here have stated their factual case at its highest in the pleadings. Presumably there are no further facts which exist to support the claim, otherwise they would have been pled. In this respect I agree with the comments of Smith J. in *Hoffman v. Monsanto Canada Inc.* (certification decision) quoting Conrad J. in *Tottrup v. Alberta (Minister of Environment)*, 2000 ABCA 121, [2000] 9 W.W.R. 21 (Alta. C.A.), where she stated in para. 33:

> 33 ... It is not sufficient for the plaintiffs to argue simply that the area of law at issue is complex and evolving and that the Court should therefore refrain from determining the question until it has all the evidence at trial before it. The test to be applied assumes that all factual determinations will be favourable to the plaintiffs. The plaintiffs, however, bear the burden of enunciating in the pleadings (or the pleadings as amended, if amendment is permitted) the facts upon which they rely for each cause of action asserted. In this respect, I agree with the comments of Conrad J.A. in *Tottrup v. Alberta (Minister of Environment)*, 2000 ABCA 121, [2000] 9 W.W.R. 21 (Alta. C.A.), addressing the issue of whether the plaintiffs had pled facts sufficient to support the allegation of a duty of care in a claim for negligence. Conrad J.A. emphasized that the Court must pay strict attention to the facts pled and that it was only the pled facts that could sustain the plea, commenting:
>
> > In my view, it is not the allegation of a duty at law that is critical, but the facts alleged supporting such a duty. For example, a statement of claim alleging only that "A" breached a duty owed to "B" thereby causing damage does not, in my view, disclose a cause of action. Pleadings are allegations of fact and, in my view, where negligence is alleged, that allegation must be supported by facts capable of sustaining a determination that a duty was owed, that an act or omission occurred breaching that duty, and that damages resulted. On a motion to strike it is the allegations of fact that must be examined to determine whether a cause of action exists.
> >
> > .... The plaintiff *receives the benefit of an assumption that all the facts which he or she has chosen to plead are true*...

> It is an appropriate function of the Court to consider and determine these questions of law on the basis of the alleged facts. The existence of a duty of care, for example, may depend on the facts of the case, but whether certain facts could sustain a finding of such a duty is a question of law....(at paras. 11-13) (Italics in the original)

. . .

29 The plaintiffs are given the benefit of assuming, as stated, that they have pled their factual case at its highest. I must determine then whether these facts can support a cause of action in law.

30 Here, as well, like in *Hoffman v. Monsanto Canada Inc.* (certification decision), the principal challenge faced by the plaintiffs in relation to this criterion is to persuade the court that there is a plausible legal basis for imposing on the defendants' liability for losses the plaintiffs may have suffered from the train derailment, on the basis of the facts as pled. The plaintiffs conceded in argument that every asserted cause of action is novel, in at least some respect. The plaintiffs relied heavily on the position that, given the novelty of the claim, it should be left for the trial judge to consider whether this is an appropriate case to expand the legal category at issue. This presents a recurring issue which is addressed in the discussion that follows. While the issue can only be determined in the context of the cause of action alleged, I have concluded that it is open to the court on the certification application, to address the question of whether a novel claim has a reasonable prospect for success. Indeed, this was the approach taken by Smith J. in *Hoffman v. Monsanto Canada Inc.* (certification decision) where she stated at para. 36:

> 36 The magnitude of this challenge is evident. In virtually every case, the plaintiffs conceded in argument that the cause of action asserted was in at least some respect novel, and relied heavily on the position that, given the novelty of the claim, it should be left for the trial judge to consider whether this is an appropriate case to expand the legal category at issue. This presents a recurring issue which is addressed in the discussion that follows. While the issue can only be determined in the context of cause of action alleged, in general I have concluded that it is open to the Court on this application, as it is under an application under Rule 173(a), to address the question of whether a novel claim has a reasonable prospect for success. Such determinations have been made on applications such as this, as I will demonstrate below. In some cases the Court may conclude that the matter ought to be determined in the context of a full evidential inquiry. In others, the facts to be assumed in support of the cause of action asserted are entirely clear and this Court as well as appellate courts will be at no disadvantage in addressing the issue on this application.

. . .

31 This approach gained the approval of the Saskatchewan Court of Appeal in *Hoffman v. Monsanto Canada Inc.* (appeal decision). The Saskatchewan Court of Appeal at para. 46 commented that one of the rationale for the screening of actions under s. 6(a) was to guard against less than genuine actions. The Saskatchewan Court of Appeal went on, at paras. 57 to 59, to approve Justice Smith's approach to a novel claim and her refusal, on the certification, to expand the law of negligence, because of policy reasons:

> ¶57 Having thus noted that each of the causes of action was novel in some respects, she went on to painstakingly consider each of them, beginning with the common law causes of action in negligence, nuisance, and trespass.
>
> **(i) negligence, nuisance, and trespass**
>
> ¶58 In considering whether the pleadings disclosed a cause of action in these respects, Justice Smith first identified the governing body of principle in each instance and then applied it to the cause of action as pleaded, concluding in each instance that the pleadings did not disclose a cause of action. Her analysis is found at pages 19 through 48 of her reasons for judgment as reported at (2005), 264 Sask. R. 1. We can find no material error of principle in her reasons, nor any material error in her application of the governing principles to the causes of action as pleaded. Indeed, we largely agree with her analysis. In our judgment, then, there is no tenable basis for interfering with her conclusion to the effect the pleadings did not disclose an apparently genuine cause of action in negligence, nuisance, and trespass.

¶59 By way of brief elaboration, we may say we agree with her application on the principles of *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) as refined in *Cooper v. Hobart* and *Edwards v. Law Society of Upper Canada*, *supra*. In our opinion she correctly concluded that the pleadings did not disclose a relationship of sufficient **proximity to give rise to a *prima facie* duty of care of the nature of that pleaded and, even it were otherwise, there are sound policy reasons for negating the duty in view of the fact the federal government had approved the unconfined release of Liberty Link and Roundup Ready**.

[Emphasis added]

32 Having regard to the nature of the pleadings here, especially in relation to the claims in negligence, I share the view that where the facts to be assumed in support of the cause of action are entirely clear, this Court is at no disadvantage in addressing the issue on this application.

33 I will now turn to consideration of each of the causes of action.

1. Does the Statement of Claim Disclose a Cause of Action in Negligence?

34 The plaintiffs' claim in negligence is set out in paragraphs 11, 12, 14, 15, 16, 20, 21 and 23. The damages alleged are summarized in paras. 24 and 25:

11. The Defendant, Canadian Pacific Railway Limited, is a corporation carrying on business in and under the laws of Canada, headquartered in Calgary, Alberta. The Defendant, Canadian Pacific Railway Company, is a corporation carrying on business in and under the laws of Canada, headquartered in Calgary, Alberta. The Defendants were involved in the Derailment as the operator of the cars, rail line, and equipment involved in the Derailment. At all times material to this claim the said Defendants were the owner or occupier of all of the land in the Designated Area involved in the Derailment.

12. The Derailment was the derailment of six railway cars off the rail line running through Estevan, Saskatchewan which occurred on or about August 8, 2004 due to the negligence of the Defendants at a railway crossing operated by the Defendants and located at or near 13 th Avenue in Estevan, Saskatchewan. The Derailment occurred when the train backed up onto a secondary line.

. . .

14. Of the six cars which derailed in the Derailment, five contained anhydrous ammonia, which is a hazardous chemical. Three of the cars containing anhydrous ammonia turned on their side.

15. As a result of the derailment, the Defendants evacuated all residents and businesses within a three-block radius of the Derailment which is the Designated Area.

The Common Issues

16. All of the Plaintiffs and Class Members have in common that each has suffered:

a. Disruption of their personal and social life;

b. The Plaintiffs' safety was endangered;

c. The Plaintiffs have suffered financial loss, *inter alia*:

(a) Cost of alternate accommodation;

(b) Cost of meals outside the home;

(c) Cost of transportation;

(d) Cost of replacement of needed items;

d. Businesses which operated within the Designated Area could not be operated and as a result, the Derailment caused an interruption of business and a loss of income.

e. The Plaintiffs have suffered property loss defined as loss of use and enjoyment of property for a clearly determined amount of time as measured by the period during which the evacuation order was in effect.

f. Economic loss contingent on and associated with the loss described in paragraph 16(e) herein;

. . .

Negligence

20. The Defendants as the owners and operators of the railway cars and line owed a duty of care to the residents and business in the Designated Area being land located near the railroad tracks owned and operated by the Defendants. Further, as the owners and operators of railway cars transporting a dangerous substance such as anhydrous ammonia, the Defendants owed a special duty of care to take precautions not to endanger the security of residents in the Designated Area. The Defendants were aware of injuries caused by a derailment of a railway cars carrying anhydrous ammonia which occurred in Minot, North Dakota, USA, in 2002, and as such the Derailment, evacuation order, and damages caused by the Derailment were foreseeable. The Defendants were also aware of a series of derailments that occurred prior to the Derailment in question, the details of which are too prolix for inclusion herein but which details are already known to the Defendants.

20a The particulars of the Duty of Care are as follows:

20b This case falls within or is analogous to a category of case in which a duty of care has previously been recognized — that of the operator of a means of conveyance or transportation which is regulated by federal statute when the operator is engaging in the backing up procedure of the means of conveyance or transportation.

20c The railroad tracks extended through the center of the city of Estevan and onwards through zones lawfully designated as commercial and then through zones lawfully designated as residential, and passed by houses and buildings clearly and accurately designated on maps of the city, all of which was contained and readily accessible in the public record and of which the Defendants had knowledge.

20d The businesses and homes of the class members were located in an area of extremely close physical propinquity and proximity to the railroad tracks on which the cars in question regularly traversed. In some instances, the railroad tracks were located within five meters or less from parcels of land on which the homes and businesses were located. In terms of physical propinquity, the Defendants' land in relation to the land of the class members was such that the Defendants were literally neighbours to class members and in the neighbourhood of others.

20e As such, the Defendants knew of the existence of the class members who were their direct neighbours as well as to those who were their neighbours indirectly down the street from the railroad tracks.

20f They knew or ought to have known, and it was reasonably foreseeable and within the reasonable contemplation of the Defendants, that the class members would stand to incur damaging interference with their property rights, mental security and psychological integrity, and associated economic loss, as a likely result caused if the Defendants carelessly allowed the trains to derail thereby causing the neighbourhood to be shut down by evacuation order so that class members could not access their homes and operate their businesses like they did each day when the trains remained on the tracks.

20g From the railroad, the Defendants could and regularly did see with the own unaided eyes of its employees and directors the homes and businesses of class members. In particular, the Defendants could see persons entering into the land and buildings in which the homes and businesses were located. From the windows of its trains, the Defendants could see business transactions being conducted through the windows of the businesses of class members. The Defendants could see class members engaging in recreational activity within their backyards and frontyards [*sic*], and in many instances could see into the homes of the class members through the windows of the buildings where they could see class members engaging in and enjoying activities associated with modern residential living including housekeeping and pursuits of leisure.

20h As such, the Defendants knew or had knowledge of the activities that occurred on the properties of the class members and could reasonably have foreseen that class members would not be able to engage in those activities if derailment of the Defendants' trains occurred and resulted in evacuation of the neighbourhood and the inability of the Plaintiffs to access and operate their homes and businesses.

20i Further particulars of the close and direct relationship of proximity include that the Defendants would regularly honk and blow their trains whistles and wave at Plaintiffs and class members who regularly came into close physical propinquity with the railroad tracks. The Defendants knew that injury was likely to result to class members who came into contact with the railroad tracks. The Defendants also knew or ought reasonably to have foreseen that injury was likely to result to class members if the trains of the Defendants left their railroad tracks.

20j Many employees and officers of the Defendant had their personal homes in the evacuated neighbourhood and within the city of Estevan and regularly engaged in conversations with and conducted business transactions with the class members whereby they came upon knowledge of the nature and scope of the class members' businesses.

20k All class members had a possessory or propriety interest in the real property or were employees of and earned their livelihood from the businesses operated from and buildings located on the real property that were within the Designated Area.

20***l*** Accordingly, the Defendants owed the Plaintiffs both a duty to care about the Plaintiffs and their legal interests and had a duty to take care to avoid those acts and omissions in the carrying on of their transportation service business that were reasonably foreseeable and likely to result in interference with the legal interests of those living, carrying on business or engaging in employment in the geographic region of the evacuation order during the time within which it was in effect.

20m There exists no residual policy considerations between the Defendants and the Plaintiffs or outside the relationship of the parties that ought to reduce or limit the scope of the duty, the class of persons to whom it is owed, or the damages to which a breach of it may give rise.

20n The Defendants had a duty to take reasonable care to operate its trains in such a manner that they do not fall off the track when those trains are engaged in the performance of a service of transporting hazardous substances and dangerous goods between two geographical points. The Defendants have breached this duty.

21. The Derailment was caused by the negligence of the Defendants, *inter alia*, as follows:

a. Failure to operate the railway cars in a safe and appropriate manner.

b. failure to take any or adequate manoeuvres to avoid the said derailment;

c. operating the railway cars without due care and attention;

d. failure to keep a proper lookout; and

e. failure to take appropriate care in operating the railway line.

f. failure to keep their railway equipment, railway works, line works as those terms are defined in the Railway Safety Act, R.S. 1985, c. 32 (4th Supp.) in a state of good and reasonable repair and condition in a manner that is contrary to safe railway operations and that is an unreasonable threat to public safety of human life and health and of property and the environment in the transportation of dangerous goods.

Res Ipsa Loquitur

22. The railway cars which derailed were under the sole management and control of the Defendants, or of someone for whom the Defendants are responsible or for whom the Defendants have a right to control and the occurrence of derailment of railway cars is such that it would not have happened without negligence. Moreover, there is no evidence as to why or how the occurrence took place. As a result, it follows, on a balance of probability, that the Defendants, or the person for whom the Defendants are responsible, and vicariously liable, must have been negligent. The doctrine of res ipsa loquitur therefore applies.

Causation

23. The acts, omissions, wrong doings, and breaches of legal duties and obligations of the Defendants have caused or materially contributed to the Plaintiffs suffering injury, economic loss, and damages.

. . .

Damages

24. The Plaintiffs have suffered real and substantial injury, economic loss, and damages arising from the aforesaid acts, omissions, wrong doings, and breaches of legal duties and obligations of the Defendants.

25. By reason of the acts, omissions, wrong doings, and breaches of the legal duties and obligations of the Defendants, the Plaintiffs have suffered injury, economic loss, and damages, the particulars of which include the following:

a. Disruption of their personal and social life;

b. The Plaintiffs' safety was endangered;

b.l. Stress, worry, apprehension of imminent harm, and inconvenience;

c. The Plaintiffs have suffered financial loss, *inter alia*:

(a) Cost of alternate accommodation;

(b) Cost of meals outside the home;

(c) Cost of transportation;

(d) Cost of replacement of needed items;

c.l. The Derailment caused an interference with the liberty of class members to enter and exit their homes and businesses during times of their choosing and their right to use, enjoy and engage in activities on their property when and as they see fit.

d. Business which operated within the Designated Area could not be operated and as a result, the Derailment caused an interruption of business and a loss of income.

e. Exemplary and punitive damages should be awarded in a sum sufficient to impress upon the Defendants and other corporations in the railroad business in Canada and elsewhere, that the judicial system, as one of the three arms of governance in the democracy of Canada, will not permit the Defendants, and others in similar circumstances, to make safety and potentially life and death decisions on the basis that it is cheaper to take risks and pay for the damage, than to take appropriate care. This is particularly so where human harm and loss of life is at issue. Pending discovery and a determination of the probable cause of the Derailment, whether the Derailment was caused by a broken journal on a wheel, a switch problem, rain softening the road which had not been appropriately and recently inspected, line problems flowing from a lack of inspection and replacement, or any of the possible causes of such a derailment, the failure to take corrective action by the Defendants is notable, *inter alia*, regarding exemplary and punitive damages.

(a) Recent similar derailments sometimes involving hazardous products with a similar human potential for endangering employees of the Defendants and others in the area of the rail line are as follows:

(i) A derailment in March/April, 2004 at Secretin. near Chaplin, Saskatchewan on the Swift Current subdivision involving anhydrous ammonia.

(ii) A derailment in December, 2001 in Minot, North Dakota, on the Weyburn subdivision involving anhydrous ammonia and involving loss of life.

(iii) A broken rail incident occurred on the Weyburn subdivision in March of 2002 with a train similarly carrying anhydrous ammonia but there was no derailment because of the handling by the Defendants' operator to split the train, but the pattern of danger, though established, was ignored by the Defendants.

(b) These very similar derailments involving the same hazardous product as the matter at issue in the within litigation, one derailment on the adjacent subdivision, and one derailment and another potential derailment, on the very subdivision in question, should be considered conjunctively with other derailments involving hazardous product and other derailments generally caused *inter alia* by the following factors:

(i) The speery car x-rays of the rails and the teck car x-rays indicate that the Defendants have been running contrary to their standard because of not reducing the speed of the run appropriately, and an increase in frequency of speery car and teck car indicators of danger have been ignored by the Defendants. The Defendants should have been running under standard at lower speeds but this was not done.

(ii) The hotbox frequency similarly shows an increase over the years from the hotbox detectors, yet corrective action has not been taken.

(c) A pattern of cutbacks in personnel employed by the Defendants in track maintenance resulting cumulatively in approximately 50% of the persons involved in track maintenance being laid off, or not replaced in a period of approximately eight years, with the resulting diminution of safety.

(d) Systemically undertaking a deceptive system of reporting of track problems and failures to the Transportation Safety Board. National Transportation Agency, and in Transport Canada reports generally, by an internal valuation of track and related expense as being written off and of little value, so that derailments may be defined as causing damage of amounts manipulated to avoid the necessity of reporting, and the Defendants thereby avoid appropriate scrutiny. Instead the Defendants ought to have been reporting derailments based on the value of clean up, repair, and replacement.

35 The essential elements of an action in negligence are a duty of care owed by the defendants to the plaintiffs to conform to a certain standard of care, breach of that duty, and damage to the plaintiffs caused by the breach, and proximity or lack of remoteness of causation (*Hoffman v. Monsanto Canada Inc.* (certification decision) (para. 43)).

36 In the pleadings set out above, the plaintiffs say the defendants, as owners and operators of the railway cars, owed a duty of care to the residents and businesses in the land located near the railway tracks. Further, the plaintiffs assert that the defendants, as transporters of dangerous substances, owed a special duty to take precautions not to endanger the security of residents in the area. The plaintiffs assert that the defendants breached those duties and caused harm to the plaintiffs. The plaintiffs assert that the harm caused to the plaintiffs was, (1) interference with property rights; (2) economic loss; and (3) interference with psychological integrity and/or security also described in the claim as stress, worry, apprehension of imminent harm and inconvenience.

37 The defendants assert that there is no reasonable cause of action in negligence because the law of negligence does not recognize a duty of care on the part of the defendants to protect plaintiffs against the type of losses claimed, that is, pure economic loss, interference with property rights or a psychological security, stress or worry.

38 The principle issue, as stated earlier, in relation to the claims of negligence asserted here, is whether the facts alleged support the imposition of a duty of care on the defendants toward the plaintiffs.

39 It is trite that defendants are not held liable to plaintiffs unless they owe plaintiffs a duty of care. The existence of a duty is a question of law for the court to decide. The Supreme Court of Canada in *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 91 D.L.R. (4th) 289 (S.C.C.), confirmed that the two-pronged test respecting duty and care set out in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728, [1977] 2 W.L.R. 1024 (H.L.) (hereinafter "*Anns*") is the law in Canada. The passage from *Anns* frequently quoted, reads as follows from pp. 751 and 752:

> ... [T]he position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has bee held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity of neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause the damage to the latterCin which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise...

40 Two recent decisions of the Supreme Court of Canada have refined and elaborated the *Anns* test, both, interestingly, in the context of determining whether a statement of claim disclosed a cause of action for the purpose of certifying the action as a class action. In *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562 (S.C.C.), McLachlin C.J. and Major J., stated as follows:

> 9 At the first stage of the *Anns* test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy. The starting point for this analysis is to determine whether there are analogous categories of cases in which proximity has previously been recognized. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances. Mere foreseeability is not enough to establish a *prima facie* duty of care. The plaintiff must also show proximity — that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.

> 10 If the plaintiff is successful at the first stage of *Anns* such that a *prima facie* duty of care has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the *Anns* test must be addressed. That question is whether there exist residual policy considerations which justify denying liability. Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.

41 As stated in *Edwards*, *supra*, the starting point for the analysis of the first stage of the *Anns* test is to determine whether there are analogous categories of cases in which a duty has been recognized. If no such cases exist, the question is whether a new duty of care should be recognized in the circumstances.

42 In *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.), the Supreme Court of Canada dealt with an issue similar to that in the *Edwards* case, *supra*, and the two decisions were delivered simultaneously. The issue before the court in *Cooper*, *supra*, was whether a private law duty of care in tort is owed by the registrar under the *Mortgage Brokers Act*, R.S.B.C. 1996, c. 313, a statutory regulator, to members of the investing public, for failure to properly oversee a broker licensed by the regulator, giving rise to liability in negligence for economic losses the investors sustained. Paragraphs 30-39 from *Cooper*, *supra*, set out the view of the Supreme Court of Canada on the approach to be taken where there are no analogous categories of cases establishing a duty of care:

> 30 In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.
>
> 31 On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.
>
> 32 On the first point, it seems clear that the word "proximity" in connection with negligence has from the outset and throughout its history been used to describe the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed. "Proximity" is the term used to describe the "close and direct" relationship that Lord Atkin described as necessary to grounding a duty of care in*Donoghue v. Stevenson*, *supra*, at pp. 580-81:
>
> > Who then, in law is my neighbour? The answer seems to beCpersons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.
> >
> > . . . . .

> I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.
>
> [Emphasis added.]

33 As this Court stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24, *per* La Forest J.:

> The label "proximity", as it was used by Lord Wilberforce in *Anns*, *supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.
>
> [Emphasis added.]

34 Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

35 The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic. As stated by McLachlin J. (as she then was) in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1151: "[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (cited with approval in *Hercules Managements*, *supra*, at para. 23). Lord Goff made the same point in *Davis v. Radcliffe*, [1990] 2 All E.R. 536 (P.C.), at p. 540:

> ... it is not desirable, at least in the present stage of development of the law, to attempt to state in broad general propositions the circumstances in which such proximity may or may not be held to exist. On the contrary, following the expression of opinion by Brennan J. in *Sutherland Shire Council v. Heyman* (1985) 60 ALR 1 at 43-44, it is considered preferable that 'the law should develop categories of negligence incrementally and by analogy with established categories'.

36 What then are the categories in which proximity has been recognized? First, of course, is the situation where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property. This has been extended to nervous shock (see, for example, *Alcock v. Chief Constable of the South Yorkshire Police*, [1991] 4 All E.R. 907 (H.L.)). Yet other categories are liability for negligent misstatement: *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.), and misfeasance in public office. A duty to warn of the risk of danger has been recognized: *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189. Again, a municipality has been held to owe a duty to prospective purchasers of real estate to inspect housing developments without negligence: *Anns*, *supra; Kamloops*, *supra*. Similarly, governmental authorities who have undertaken a policy of road maintenance have been held to owe a duty of care to execute the maintenance in a non-negligent manner: *Just v. British Columbia*, [1989] 2 S.C.R. 1228, *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445, etc. Relational economic loss (related to a contract's performance) may give rise to a tort duty of care in certain situations, as where the claimant has a possessory or proprietary interest in the property, the general average cases, and cases where the relationship between the claimant and the property owner constitutes a joint venture: *Norsk*, *supra; Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210. When a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited.

> 37 This brings us to the second stage of the *Anns* test. As the majority of this Court held in *Norsk*, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability *in Hercules Managements*, *supra*, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.
>
> . . .
>
> 39 The second step of *Anns* generally arises only in cases where the duty of care asserted does not fall within a recognized category of recovery. Where it does, we may be satisfied that there are no overriding policy considerations that would negative the duty of care. In this sense, we agree with the Privy Council in *Yuen Kun Yeu* that the second stage of *Anns* will seldom arise and that questions of liability will be determined primarily by reference to established and analogous categories of recovery. However, where a duty of care in a novel situation is alleged, as here, we believe it necessary to consider both steps of the *Anns* test as discussed above. This ensures that before a duty of care is imposed in a new situation, not only are foreseeability and relational proximity present, but there are no broader considerations that would make imposition of a duty of care unwise.

43 As *Edwards*, *supra*, and *Cooper*, *supra*, illustrate, the Supreme Court of Canada confirmed that a court should consider whether the facts as pled set out a situation which falls within a recognized (or analogous) duty of care and where reasonable foreseeability is established, a *prima facie* duty of care is posited. If the facts as pled do not fall within a recognized duty of care, then the court must consider whether there is foreseeability of harm, relational proximity, and if both, then go on to consider whether there are any policy reasons to refuse to impose a duty.

44 The defendants assert that there is no reasonable cause of action in negligence in the plaintiffs' claim. The defendants acknowledge that the courts have recognized negligence where the defendants' act foreseeably causes physical harm to the plaintiff (including nervous shock) or the plaintiff's property, where there is a negligent misstatement and in cases of relational economic loss. However, the defendants argue the pleadings here do not fall within any of these analogous cases. The defendants assert further that the law of negligence does not recognize a duty of care on the part of the defendants to protect the plaintiffs against losses such as claimed here: pure economic loss; interference with property rights; and/or psychological security or stress. The defendants assert further that there are policy reasons which militate against extending the law of negligence to cover against the types of losses claimed by the plaintiffs here.

(a) Does the statement of claim disclose a cause of action in negligence for interference with psychological integrity or mental integrity, stress or worry?

45 The pleadings in paragraphs 20f and 25 b.1 assert that the defendants' negligence have caused them injury and damages as follows:

> 20f They knew or ought to have known, and it was reasonably foreseeable and within the reasonable contemplation of the Defendants, that the class members would stand to incur damaging interference with their property rights, mental security and psychological integrity, and associated economic loss, as a likely result caused if the Defendants carelessly allowed the trains to derail thereby causing the neighbourhood to be shut down by evacuation order so that class members could not access their homes and operate their businesses like they did each day when the trains remained on the tracks.
>
> . . .

> 25. By reason of the acts, omissions, wrong doings, and breaches of the legal duties and obligations of the Defendants, the Plaintiffs have suffered injury, economic loss, and damages, the particulars of which include the following:
>
> . . .
>
> b.1 Stress, worry, apprehension of imminent harm, and inconvenience.

46 The pleadings assert that the defendants owed a duty of care to the plaintiffs, which duty they breached, and that the plaintiffs' safety was endangered which caused them stress, worry, apprehension of imminent harm and inconvenience.

47 The *Anns* test as qualified by *Edwards*, *supra*, and *Cooper*, *supra*, must be employed to determine whether there is a cause of action in negligence for the stress, worry and interference with psychological security allegedly suffered by the plaintiffs here. Justice Richards, in *Holland v. Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)*, 2007 SKCA 18, [2007] S.J. No. 75 (Sask. C.A.), very succinctly set out the *Anns* approach at paras. 37-38:

> [37] The first stage of the *Anns* analysis requires preliminary consideration of whether, in relation to the claim being advanced, there presently exists a recognized duty of care. The question in this regard is whether the claim advanced is one which falls within or is analogous to any category of cases where a duty of care has previously been recognized. I conclude that it does not...
>
> [38] Accordingly, it is necessary to ask whether this is a situation in which a new duty of care should be recognized. This can be done in brief compass because, in my opinion, it is not necessary to consider the first stage of the *Anns* test to answer that question. Even if the respondent can establish proximity sufficient to found a duty of care, there are strong policy considerations under the second stage of *Anns* which negative any *prima facie* duty which might be found.

48 Here, there is no pleading which asserts directly that any person suffered physical injury. The plaintiffs seek, however, to characterize the claims for stress, worry, interference with psychological integrity and mental security as claims for personal injury.

49 The courts have recognized claims for "nervous shock" as claims for personal injury. But the courts have limited the claims of nervous shock to plaintiffs who suffer symptoms of a "recognizable psychiatric illness". It must be something more than general emotional upset. A.M. Linden in *Canadian Tort Law*, 7th ed. (Markham, Ont.: Butterworths, 2001) discusses at p. 390 the limitation in the law in relation to claims for nervous shock:

> To this day the courts steadfastly refuse to allow tort damages for every emotional upset and **insist upon some physical symptoms like a heart attack or a miscarriage, or some "recognizable psychiatric illness", like schizophrenia or morbid depression. Mere emotional upsets, no matter how distressing, are not alone sufficient to found a cause of action."** The temporary emotion of fright, for example, is so trivial and so easily faked that it cannot be permitted to support the action. Grief alone will not yield damages. Nor will liability be imposed because of a few tears or a sleepless night.
>
> As Mr. Justice Morden has explained in *Duwyn v. Kaprielian* [(1978), 7 C.C.L.T. 121 at p. 142] **the "kind of 'nervous shock' for which recovery may be had involved something more than general emotional upset."**...
>
> [Emphasis added]

50 The courts in Saskatchewan have confirmed this limitation for liability for nervous shock. Justice Rothery in *Knife (Litigation Guardian of) v. Charles*, 2005 SKQB 516, 272 Sask. R. 111 (Sask. Q.B.) struck a claim for stress as disclosing no reasonable cause of action. In that case children alleged they experienced stress as a result of the defendant's negligent performance of a dental procedure on their father. Justice Rothery, in striking out the claim, had the following to say about a claim for stress, at paras. 9-11:

[9] The claim for damages resulting from stress experienced by the children discloses no reasonable cause of action. While the law recognizes a claim for damages for a recognizable psychiatric illness in tort actions, it does not recognize a claim for "stress" caused by the injury. As stated in G.H.L. Fridman, *The Law of Torts in Canada* (2nd ed.) (Toronto: Carswell, 2002) at p. 348.

> Nervous shock for this purpose is what Lord Wilberforce termed "recognisable and severe physical damage to the human body and system ... caused by the impact, through the senses, of external events on the mind." The courts differentiate this, which is actionable in certain situations, from grief or emotional distress short of nervous shock. Sorrow, as contrasted with illness produced by some attack on a plaintiff's nervous system brought about by the negligence of the defendant, is not a basis for an action, nor is it damage which can be compensated for by an award of damages in an action in tort. Nor are shocks, strains, upsets or anxiety. There must be suffered by the plaintiff a "recognizable psychiatric illness." Emotional suffering without psychiatric symptoms does not qualify for tort relief.

[10] In *Beaulieu v. Sutherland* (1986), 35 C.C.L.T. 237 (B.C. S.C.), the court reviewed the law on this matter:

> Sorrow, grief or emotional distress are not in themselves compensable. There must be some recognizable psychiatric or psychosomatic condition attributable to the defendant's breach of duty of care owed to the plaintiff. In *Hinz v. Berry*, [1970] 2 Q.B. 40 (1970) 1 All England Reports 1074, Lord Denning stated at p. 1075:
>
> > ... In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are to be given for the worry about children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are however recoverable for nervous shock, or, to put it in medical terms, for any recognisable psychiatric illness caused by the breach of duty by the defendant ...

[11] ... Stress is not compensable in a negligence law suit. In summary, the entire paragraph 18 must be struck for disclosing no cause of action.

51 In *Satara Farms Inc. v. Parrish & Heimbecker Ltd.*, 2006 SKQB 229, 280 Sask. R. 44 (Sask. Q.B.), Justice R. S. Smith came to a similar conclusion after reviewing the law with respect to tortuous liability for nervous shock. He said at paras. 106-108:

> [106] It is worthwhile to review that tortuous liability for a plaintiff suffering mental distress is reasonably circumscribed. Recovery is only permitted where the damages are a foreseeable consequence of the negligence and is founded on some physical injury or recognizable psychiatric illness. (See: Lewis N. Klar et al, *Remedies in Tort*, looseleaf (Thomson Canada Limited, 1987) vol. 2, ch. 16 at para. 218).
>
> [107] The above principle was given application in a 1997 decision, *Peters-Brown v. Regina District Health Board* (1996), 148 Sask. R. 248 (Sask. C.A.). The Saskatchewan Court of Appeal concluded that before damages are awarded for the plaintiff's mental condition, the court is obligated to find "nervous shock" that encompasses more than a mere emotional upset or anxiety.
>
> [108] Professor Burrows, at page 338 of the same article, also observes:
>
> > But outside a contractual relationship, to expand liability in the tort of negligence to cover mere mental distress would be highly controversial for that would be to expand enormously the scope of that tort and would raise legitimate fears of 'opening the floodgates of litigation.' One can also argue that the mere mental distress is a transient and less significant type of harm than personal injury, property damage or economic loss and that, for that reason, one should not expand liability in the tort of negligence to cover it.

52 The pleadings here assert that it was foreseeable that the plaintiffs would incur interference wth their mental security and psychological integrity. The pleadings assert that the plaintiffs suffered stress and worry, nothing more. No

recognizable psychiatric illness or "nervous shock" is alleged here, presumably because no such injury exists. While the plaintiffs attempt to characterize the claim for stress and worry as a claim for "nervous shock", they also acknowledge at paragraph 502 of their written brief, that "the statement of claim pushes the envelope on claims for nervous shock and seeks recovery for stress and worry". The law is clear that emotional distress, stress or worry are not in themselves compensable. The claim does not fall within nor is it analogous to the category of cases where a duty of care has been recognized for nervous shock.

53 It is then necessary to ask whether this is a situation in which a new duty of care should be recognized. The Ontario Court of Appeal in *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (Ont. C.A.) addressed the issue of the expansion in tort for psychological damage and nervous shock at some length in a case where parents were claiming nervous shock after learning their daughter had consumed contaminated juice. The court first addressed the requirement that the psychiatric damage allegedly caused was reasonably foreseeable. The court said:

> **(1)**
>
> *Liability for psychiatric damage*
>
> . . .
>
> [25] In Canadian law, a plaintiff can recover for the negligent infliction of psychiatric damage if he or she establishes two propositions — first, that the psychiatric damage suffered was a foreseeable consequence of the negligent conduct; second, that the psychiatric damage was so serious that it resulted in a recognizable psychiatric illness: see Linden, *Canadian Tort Law*, *supra*, at pp. 389-92.
>
> [26] The leading case in Ontario in the domain of psychiatric damage clearly and succinctly enunciates the requirement that the plaintiff establish both propositions. In *Duwyn v. Kaprielian* (1978), 22 O.R. (2d) 736, 94 D.L.R. (3d) 424 (C.A.), a mother experienced an extreme psychological and emotional reaction when she arrived at the scene of a minor automobile accident and saw her young son, uninjured but screaming, inside the car. Morden J.A. stated, at pp. 747 and 754-55:
>
> > ... *[T]he test of liability for nervous shock is the foreseeability of nervous shock*. This puts the law of negligence concerned with this kind of claim, at least according to its verbal formulation, in line with general negligence law.
> >
> > . . .
> >
> > The law is relatively clear that the kind of "nervous shock" for which recovery may be had involves something more than general emotional upset. I refer to Lord Denning in *Hinz v. Berry*, [1970] 2 Q.B. 40 at 42, where a wife saw her husband fatally injured:
> >
> > > In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. *Damages are, however, recoverable* for nervous shock, or, to put it in medical terms, *for any recognisable psychiatric illness* caused by the breach of duty by the defendant.
> > >
> > > (Emphasis added.)
>
> ***(a) Foreseeability***
>
> [27] Morden J.A.'s proposition that the test of liability for nervous shock is the foreseeability of nervous shock is consistent with the leading duty of care cases from the Supreme Court of Canada: see, for example, *Kamloops (City) v. Nielson*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641 the unanimous decision of the court in *Winnipeg Condominium*

> *Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, 121 D.L.R. (4th) 193 and the recent decision in *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753, 174 D.L.R. (4th) 1, where the *Anns* test of liability is affirmed as the proper way to establish a duty of care in Canadian tort law.
>
> [28] *Duwyn v. Kaprielian* has also been followed in all of the leading cases in Ontario. For example, in *Bechard v. Haliburton Estate* (1991), 5 O.R. (3d) 512 at 518, 84 D.L.R. (4th) 668 (C.A.), Griffiths J.A. stated that "under Canadian and English law reasonable foresight of nervous shock to the plaintiff is the touchstone of liability": see also *Nespolon v. Alford* (1998), 40 O.R. (3d) 355, 161 D.L.R. (4th) 646 (C.A.), especially at pp. 364-66 per Abella J.A., where reasonable foreseeability of nervous shock, potentially limited by policy considerations, is utilized as the proper test for imposing a duty of care in these types of situations.
>
> . . .
>
> [33] So, what is the answer to the question, "Is it reasonably foreseeable that parents in the position of Ivan and Georgina Vanek would suffer some degree of nervous shock or mental, emotional and psychological distress over the well-being of their child, given the facts and circumstances of this case?"
>
> [34] Let me say at the outset that, in my view, the trial judge framed this question in particularly careful and accurate language. He tied foreseeability to "some degree" of psychiatric damage. That is all that is required at this stage of the analysis; the extent of the damage must be considered in the second step of the analysis. Moreover, the trial judge also linked foreseeability to "the facts and circumstances of this case". That, too, is an appropriate linkage. In all of the psychiatric damages cases — indeed in all of the negligence cases — foreseeability cannot be considered in the abstract; rather, the careless conduct of the tortfeasor must be assessed in the context of all of the circumstances surrounding that conduct. The surrounding circumstances will include the identity of the parties, their relationship to each other, the careless conduct, its aftermath or consequences, and the injuries suffered.
>
> . . .
>
> [45] ... and in the many other cases dealing with psychiatric damage caused to a bystander, it is clear that the courts focus their analysis on two factors — the actual event, or its aftermath, witnessed by the bystander and the reaction this event and its aftermath might engender *in the reasonable person*.
>
> . . .
>
> [61] For these reasons, in my view the trial judge erred in holding the defendants and the third party at fault for the psychiatric damage he found Mr. & Mrs. Vanek suffered. The trial judge did not address the pivotal issue of foreseeability. Had he done so, he should have concluded that the harm was not a reasonably foreseeability consequence of the juice incident.
>
> [Footnotes omitted]

54 The first question is whether it was reasonably foreseeable that the proposed class of plaintiffs would suffer stress and worry, given the facts as pled. The pleadings here assert that it was reasonably foreseeable that the "mental security and psychological integrity" of the proposed plaintiffs would be affected by the defendants negligently allowing the trains to derail, thereby causing the neighbourhood to be evacuated. While the pleadings assert such was foreseeable, that is a question of law to be determined by the court.

55 The pleadings assert that the defendants caused or omitted to do something which caused the train carrying anhydrous ammonia to derail. Could the defendants foresee that such conduct could cause the area to be evacuated? The defendants could likely foresee that a derailment of a train carrying anhydrous ammonia might likely result in an evacuation order. Then the question becomes, is it foreseeable that such derailment and evacuation order would

cause stress or worry? At this stage one must examine the relationship or proximity of the proposed plaintiffs and the defendants. The pleadings do not allege that any of the proposed plaintiffs saw the derailment. In the leading cases, the foreseeability of psychiatric damage has usually been likened to a bystander of a terrible accident or its aftermath (*Bechard v. Haliburton Estate* (1991), 84 D.L.R. (4th) 668 (Ont. C.A.) and *Duwyn v. Kaprielian* (1978), 94 D.L.R. (3d) 424 (Ont. C.A.). That degree of proximity is not alleged as being present here. These facts as pled do not allege that any person saw the derailment or its aftermath.

56 The pleadings do not allege that the plaintiffs knew, or were told, the train was carrying anhydrous ammonia. To be generous, perhaps such knowledge could be inferred from the pleadings. And perhaps, to be generous, it could be inferred from the pleadings that the plaintiffs suffered stress from the evacuation because they knew or were told the derailed train was carrying ammonia. Is there a sufficient proximity between the plaintiffs and defendants such that it is reasonably foreseeable that the plaintiffs would suffer harm in the circumstances? The proposed plaintiffs are persons or corporations who live, work, have business or are property owners who were evacuated or prevented from returning to the evacuated area. Is there a relational proximity between these plaintiffs and defendants sufficient to establish a *prima facie* duty of care? The plaintiffs assert that they are in such close physical proximity that there is sufficient relational proximity. But proximity is not confined to mere physical proximity. Rather, proximity relates to such direct and close relations that the act complained of directly affects a person whom the defendants would know would be directly affected by their careless acts. While there is likely sufficient proximity for it to be foreseeable that persons immediately adjacent to the derailed train may suffer by the evacuation caused by the derailment, it is doubtful such proximity can be said to exist to persons or corporations who were on the perimeter of the evacuated area. Even more so, it is questionable whether there is proximity in relation to those persons or corporations who were not evacuated, but who were simply prevented from returning to the area.

57 However, if I conclude there is foreseeability and proximity for all members of the proposed class, I must go on to consider under the *Anns* test, whether there are policy considerations which militate against expanding the duty of care to cover a situation of stress and worry falling short of nervous shock/recognizable psychiatric illness. Reference to Abella, J.'s comments in *Nespolon v. Alford* (1998), 161 D.L.R. (4th) 646 (Ont. C.A.), starting at para. 66 are of assistance in considering policy considerations:

> [66] The issue then becomes whether there are any policy reasons to add someone in Nespolon's circumstances to this class of persons entitled to recover damage for nervous shock. In *Hall v. Hebert*, [1993] 2 S.C.R. 159 at p. 203, 101 D.L.R. (4th) 129, Cory J. said:
>
> > ... even if a duty of care is found to exist, the court will have to determine whether, for public policy reasons, that duty should be limited in part or in whole.
>
> The cautionary words of Griffiths J.A. in *Bechard*, *supra*, at p. 520, are particularly apposite in deciding whether policy grounds justify Nespolon recovering damages from the three boys:
>
> > The "policy grounds" that have concerned the courts in these cases is that there should not be unlimited liability to persons who suffer nervous shock. The perceived danger is that every accident may generate an ever-widening circle of plaintiffs including, possibly, the casual passerby who witnesses the accident and those who come to gaze at the scene later, as well as the relatives of all of those to whom the details will be recounted.
>
> [67] In my view, there are no policy reasons to justify expanding the category of those whose nervous shock is compensable, to include a stranger in Nespolon's circumstances.

58 Like the situation in *Nespolon*, *supra*, here, there are numerous policy reasons against expanding the type of damage which is included in the tort of nervous shock to stress and worry, such as is claimed in the circumstances here. Firstly, to allow stress and worry to be compensable would be to expand enormously the scope of the tort. Stress, worry or mental distress are transient and less significant types of harm than psychiatric illness or nervous shock. It is extremely difficult to

assess such insignificant harm. Secondly, to expand the tort to such lengths would run the risk of indeterminate liability. Every person who heard, in any manner, that a train with anhydrous ammonia derailed, may suffer stress and worry. Family or friends of persons who were evacuated may suffer worry or stress. People who live outside the area but hear about the derailment from others, may suffer such stress. People outside the evacuated area, and even people outside the City of Estevan or the Province may suffer the same stress. To expand liability in this way would pose significant problems for the defendants. The defendants would face liability in an indeterminate amount for an indeterminate time to an indeterminate class. No sound reason would permit the proposed plaintiffs to recover, while denying recovery to those other types of persons. An expansion of the tort as suggested by the plaintiffs would raise legitimate fears of "opening the floodgates of litigation". These policy considerations are the same policy considerations which have caused courts to refuse the expansion of this duty of care in many other situations. In my view, there are significant policy reasons to refuse to impose a duty in circumstances such as are pled here.

59 It is my conclusion that the case before me does not present a situation in which the courts should extend the categories of recovery for nervous shock, for all of the policy reasons traditionally cited in support of the exclusion of this recovery are in play in this case.

60 I find the claims based on negligence do not assert a reasonable cause of action for the facts as pled fail to establish that the plaintiffs suffered nervous shock or a recognized psychiatric illness. The claim asserted clearly does not fall within nor is it analogous to any category of cases in which a duty of care has been established. Moreover, I have concluded that the claim would also fail on the second leg of the *Anns* test, for there are compelling policy reasons for excluding a duty of care in this case.

(b) Does the statement of claim disclose a cause of action in negligence for economic loss?

61 The pleadings, in paragraph 25, assert that the defendants' negligence caused the plaintiffs economic loss, including:

> 25. By reason of the acts, omissions, wrong doings, and breaches of the legal duties and obligations of the Defendants, the Plaintiffs have suffered injury, economic loss, and damages, the particulars of which include the following:
>
> a. Disruption of their personal and social life;
>
> b. The Plaintiffs' safety was endangered;
>
> b.l. Stress, worry, apprehension of imminent harm, and inconvenience;
>
> c. The Plaintiffs have suffered financial loss, *inter alia*:
>
> (a) Cost of alternate accommodation;
>
> (b) Cost of meals outside the home;
>
> (c) Cost of transportation;
>
> (d) Cost of replacement of needed items;
>
> c.l. The Derailment caused an interference with the liberty of class members to enter and exit their homes and businesses during times of their choosing and their right to use, enjoy and engage in activities on their property when and as they see fit.
>
> d. Business which operated within the Designated Area could not be operated and as a result, the Derailment caused an interruption of business and a loss of income.

The law has always treated negligently inflicted pure economic loss differently from consequential economic loss. Consequential economic loss is financial loss casually connected to physical damage to the plaintiff's own person or property. Consequential economic loss is governed by the same principles of recovery that apply to physical injury to the plaintiff's own person or property. Pure economic loss, however, has been governed by more restrictive duties of care.

62 The pleadings here do not assert any claim for consequential economic loss. Paragraph 16 of the claim makes it clear that the plaintiffs claim for property loss is the loss of the use and enjoyment of the plaintiffs' property during the evacuation period. The plaintiffs attempt, at para. 455 of their brief, to suggest that the claim for loss of use of property is not a claim for pure economic loss:

> ... they have each suffered property loss in the form of interference with their possessory and propriety interests upon which they can tag their economic loss. This is really not pure economic loss.

However, the plaintiffs attempt to characterize the "loss of use and enjoyment of the property" as "property damage" and not as pure economic loss, is but a fiction and cannot be supported. The loss of the use and enjoyment of one's property is economic loss. There is no physical injury to the property. Thus, the plaintiffs' claim as pled in this regard is clearly a claim for pure economic loss and not consequential economic loss.

63 The Supreme Court of Canada has recognized five categories of cases that may permit the recovery, in tort, for pure economic losses. The recognized categories of cases where recovery for pure economic loss in negligence have been allowed are outlined by Professor Bruce Feldthusen in *Economic Negligence: The Recovery of Pure Economic Loss*, 4th ed (Scarborough: Carswell, 2000). These recognized categories were adopted by LaForest J. (in dissent) in *Canadian National Railway v. Norsk Pacific Steamship Co.*, *supra*, and by the majority of the Supreme Court in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 (S.C.C.). The categories are:

1. 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.

The Supreme Court left open the possibility that new categories might emerge, but instructed that lower courts should exercise caution and not strain to create new categories.

64 As stated earlier, the *Anns* test as articulated in *Cooper* and *Edwards*, *supra*, requires the court to determine, first, whether the case falls within or is analogous to a category of cases in which a duty of care has been previously recognized. If not, then the court must inquire whether the harm in question was reasonably foreseeable and if there was a relationship of sufficient proximity or neighbourhood to warrant the imposition of liability. If a *prima facie* duty of care is indicated by that analysis, it is then necessary to address the second stage of the test: the consideration of residual policy issues which might suggest that liability should be denied. (*Holland*, *supra*). The plaintiffs acknowledge at paragraph 462 of their brief that their pleadings do not establish the first, second or fourth categories listed above. The plaintiffs assert that their pleadings establish the third category, negligent performance of a service and the fifth category, relational economic loss. Alternatively, they seek to establish a new category for recovery of pure economic loss.

65 I will consider firstly whether the pleadings assert a genuine cause of action for economic loss under the two recognized or analogous categories of cases where a duty of care exists.

(i) Negligent Performance of Service

66 The plaintiffs assert in argument that the defendants owed the plaintiffs a duty here, because the defendants were engaged in the negligent performance of a service. The plaintiffs argue the defendants had contracted with, or on behalf of, entities known to the defendants (but not known to the plaintiffs at this time) to transport hazardous chemicals from location A to B. The plaintiffs' assertion is that the defendants negligently performed their contract with the third party and, as such, the pleadings disclose a cause of action for economic loss based on the negligent performance of a service.

67 There is general agreement in law that a defendant will be held liable for the plaintiff's economic loss if the defendant voluntarily undertakes to perform a service for the plaintiff's benefit, the plaintiff relies on the defendant to perform the service, and the defendant's negligent performance of the service injures the plaintiff. That is, it is an element of the cause of action for the negligent performance of service that the plaintiff is contemplated as beneficiary of the defendant's performance of a service, if the service is for a third party.

68 There have been a number of cases where a defendant has been held to owe a duty to a plaintiff, even though there was no privity between the plaintiff and defendant. In each of these cases, the defendant's duty originated from a contractual undertaking which the defendant made to a third party. The question is under what circumstances can the defendant's breach of an obligation to a third party constitute an actionable wrong to the plaintiff.

69 Here the plaintiffs' counsel argued that the pleadings assert that the defendants had a contract with a third party for the transportation of anhydrous ammonia. No such allegation is made in the pleadings. No such third party contract is pled in the claim. It may be argued that this is implicit in the claim. If it is accepted that it is implicit in the pleadings (which is questionable), there is nothing in the pleadings which assert that the defendants had a contract with a third party for the transportation of goods, and the benefit of that contract was for the plaintiffs, as is required in the cases recognizing an established duty of care (*Whittingham v. Crease & Co.* (1978), 88 D.L.R. (3d) 353 (B.C. S.C.); *Hofstrand Farms Ltd. v. British Columbia*, [1986] 1 S.C.R. 228 (S.C.C.) where liability was denied). Nor is there any assertion that the plaintiff was at least an incidental beneficiary of the contract as in *Fraser-Brace Maritimes Ltd. v. Central Mortgage & Housing Corp.* (1980), 117 D.L.R. (3d) 312 (N.S. C.A.) leave to appeal to S.C.C. refused (1981), 117 D.L.R. (3d) 312n (S.C.C.). The pleadings do not assert such facts, presumably, because such facts do not exist.

70 The pleadings do not assert an authentic cause of action for economic loss for negligent performance of service under any of the recognized categories of cases.

(ii) Relational Economic Loss

71 The plaintiffs assert that the action is sustainable under the category or analogous to the established cases for relational economic loss. The plaintiffs specifically assert at paragraph 456: "that a duty of care is owed to them [the plaintiffs] under the framework for analyzing situations of relational economic loss advanced by the Supreme Court of Canada".

72 Relational economic loss is discussed by Feldthusen, in *Economic Negligence* at p. 193. He states:

> ... Typically, the defendant's negligence consists of an action which causes physical harm (personal injury or property damage) to a third party. Ordinarily, the defendant will be held liable to the third party under the basic rules of physical damage negligence law. The plaintiff suffers economic loss because of some relationship which exists between the plaintiff and the injured third party...

Feldthusen further discusses the development of the claims for relational economic loss at pp. 194-195:

> From at least 1846 in the United States and 1875 in England until the mid-1960's, the common law recognized a firm exclusionary rule precluding recovery for all but exceptional cases of relational economic loss. Since then there has been less talk of an outright exclusionary rule, but the fact remains that most courts will refuse to permit recovery for this type of economic loss .... More recently, the Supreme Court of Canada has taken the lead and addressed

> openly the specific policy factors that justified the decisions to deny relational claims. Regardless of the manner in which the decision is phrased, subject to a number of specific exceptions, the case law in most jurisdictions supports a firm exclusionary rule for relational loss which may be phrased as follows:
>
> > The recovery of pure economic loss will be precluded in negligence when it is consequent upon an injury to the person, property, or economic interest of a third party.
>
> There are two important points to note about this exclusionary rule. First, it applies only to relational loss; that is, when the loss claimed is consequent upon an injury to a third party ... Second, it applies only to pure economic loss and will not preclude the plaintiff from recovering for physical damage consequent upon an injury to a third party.

73 As Feldthusen has stated, there is a general exclusionary rule for the recovery of relational economic loss in negligence. The Supreme Court of Canada has provided for some exceptions to this "exclusionary rule" for relational economic loss, as noted above by Feldthusen. The Supreme Court in *Norsk*, *supra*, ruled in favour of a relational loss claimant, whose contractual right to use a rail bridge was interfered with when the defendant Norsk's vessel damaged the bridge. La Forest J. wrote the minority decision. His decision was endorsed by the whole court in two subsequent decisions: *D'Amato v. Badger*, [1996] 2 S.C.R. 1071 (S.C.C.) and *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.). The principles respecting relational economic loss set out by the Supreme Court were summarized by McLachlin J. (as she then was) in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, *supra*, at para. 48:

> 48 ... (1) relational economic loss is recoverable only in special circumstances where the appropriate conditions are met; (2) these circumstances can be defined by reference to categories, which will make the law generally predictable; (3) the categories are not closed. LaForest J. identified the categories of recovery of relational economic loss defined to date as: (1) cases where the claimant has a possessory or proprietary interest in the damaged property; (2) general average cases; and (3) cases where the relationship between the claimant and property owner constitutes a joint venture.

74 I turn then to whether the pleadings here allege facts which fall within the analogous cases allowing for the recovery of relational economic loss. The facts as alleged here by the plaintiffs do not allege that any third person or third person's property suffered physical injury as a result of the derailment. The only damage to person or property (which might be implied from the pleadings) is to the defendants' property. As stated, the established categories for relational economic loss involve physical or property injury to a third party where the plaintiff suffers loss because of some relationship with the third party. No such facts are alleged here.

75 Even if it can be said that this claim is for relational economic loss, because the defendants' property may have been damaged, the pleadings only assert an established cause of action if the claim fits under one of the three exceptions to the rule excluding recovery for relational economic loss. Feldthusen at pp. 234-36 elaborates on the exceptions endorsed by the Supreme Court of Canada:

> ... England and Canada both recognize an exception to the exclusionary rule for relational economic loss in general average cases in maritime law, and a second exception, if indeed it is an exception, when the plaintiff has a possessory interest in the damaged property.... Canada, but probably not England, will allow recovery in a true joint venture situation.
>
> . . .
>
> **(i)**
>
> *General Average*

> One important exception to the exclusionary rule that would probably be recognized everywhere is the general average claim. This exception allows cargo owners to recover their general average contributions in a direct suit against the negligent defendant. When a ship is involved in a collision it is clear that the innocent carrier can recover for damage to the ship and the cargo owner for damage to the cargo....
>
> **(ii)**
>
> *Possessory Interest*
>
> This exception is illustration primarily by ship chartering cases, but the underlying principle rests on the distinction between cases where the plaintiff has a possessory interest in the vessel and those in which she does not. When a defendant negligently damages a chartered ship there is no question that he will be liable to the owner for property damage and the consequential economic loss of the chartering fee....

76 Here, there is nothing in the pleadings which could possibly be construed to bring the plaintiffs within one of the categories of exceptions approved by the Supreme Court and referred to by Feldthusen. The pleadings do not assert that any of the plaintiffs were cargo owners (as in the general average cases). The pleadings do not assert that the plaintiffs had any possessory interest in the train. The pleadings do not assert that the plaintiffs were in any type of joint venture situation with the defendants. The pleadings could not be interpreted to assert that any of the exceptions of the exclusionary rule for relational economic loss exist.

77 The plaintiffs' pleadings do not disclose a cause of action for relational economic loss under any of the categories of cases where such a duty has been recongized.

(iii) Should a New Duty of Care be Recognized for Economic Loss?

78 As I have stated, under the first stage of the *Anns* analysis, it is clear that there is no existing recognized duty of care raised by these pleadings. The claim being advanced is not one which falls within or is analogous to any category of cases where a duty of care has been previously recognized. It is necessary to ask whether this is a situation in which a new duty of care should be recognized under the *Anns* test. The plaintiffs do seek recovery of pure economic loss, or loss that is not accompanied by physical injury or property damage. The categories of recovery for pure economic loss are not closed. However, as stated earlier, the Supreme Court has indicated that lower courts should exercise caution and not strain to create new categories.

79 The first stage of the *Anns* test is whether the pleadings allege reasonably foreseeable harm and relational proximity sufficient to establish a *prima facie* duty of care. The claim in paras. 20 a-l allege that the businesses and homes of the plaintiffs were located in an area of extremely close physical propinquity and proximity to the railroad tracks on which the defendants' cars regularly traverse. The pleadings further assert that it was reasonably foreseeable and within the defendants' reasonable contemplation that the plaintiffs would stand to incur economic loss if the defendants allowed the trains to derail. The allegations are sufficient, in my view, to support the general claims that it was foreseeable that the derailment of the defendants' train cars, carrying dangerous material, could cause harm to those in close proximity of the railroad. Indeed, foreseeability of damage is not seriously challenged by the defendants.

80 However, as required in *Cooper*, *supra*, foreseeability of loss is not sufficient to establish a *prima facie* duty of care. The plaintiffs must also establish proximity — a close relationship of such a nature that the defendants may be said to have been under an obligation to be mindful of the plaintiffs' interests. As stated in *Cooper*:

> 32 ... it seems clear that the word "proximity" in connection with negligence has from the outset and throughout its history been used to describe the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed. "Proximity" is the term used to describe the "close and direct" relationship that Lord Atkin described as necessary to grounding a duty of care in *Donoghue v. Stevenson*, *supra*, at pp 580-81:

> Who then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question
>
> . . .
>
> I think that this sufficiently states the truth if proximity be not confined to mere physical proximity but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.
>
> (Emphasis added)

81 The plaintiffs allege the defendants owed them a duty of care. This assertion is made at paras 20a-20***l***. The pleadings, however, do not allege any relationship between the plaintiffs and defendants to support relational proximity. They have only alleged physical closeness and the relationship of neighbours. The pleadings do not allege physical harm to the plaintiffs or their property. The plaintiffs have not alleged the existence of any expectations, representations or reliance on the defendants. The plaintiffs have not alleged any special relationship between themselves and the defendants. The plaintiffs have only alleged physical closeness. Indeed, they have not alleged any relationship at all, either in the pleadings or in argument before me, that would give rise to an argument for sufficient relational proximity to support a *prima facie* duty of care. I am not satisfied that the mere physical closeness of the plaintiffs and defendants is sufficient to establish a close and direct relationship, making it just to impose a duty of care upon the defendants toward the plaintiffs for economic loss.

82 However, if I am wrong and it could be concluded that proximity is established in the pleadings simply because of the very close physical propinquity of the parties, I must then turn to the second stage of the *Anns* test. In the second stage of the *Anns* test, having regard to the jurisprudence, the question is whether there are policy considerations that, in accordance with the second leg of the test, would bar or limit the imposition of the duty of care alleged on the defendants in this case. I am of the view there are.

83 The plaintiffs' claim is a claim for pure economic loss of a category not previously recognized by Canadian courts. The alleged damage is not of physical harm, but arises from the plaintiffs' loss of profit, or from the expenses which the plaintiffs incurred as a result of the evacuation order made by city officials or from the loss of use of their property. The common law has been reluctant to find a duty of care to avoid causing foreseeable pure economic loss for policy reasons. By definition, such losses are not the direct result of the defendants' actions. While the plaintiffs have pled in paragraph 20m that there are no residual policy considerations limiting the scope of the duty of care, such a pleading is not a pleading of fact, but a legal conclusion. The court must determine whether the facts as pled, support expanding the cause of action.

84 The most obvious policy consideration here in determining whether to extend the law of negligence for economic loss, is the issue of indeterminate liability, a consideration which has caused the courts on many previous occasions to limit recovery. In *Bow Valley Husky*, *supra*, the Supreme Court of Canada rejected the expansion of a duty of care because of the problem of indeterminate liability. The court said at paras. 62-67:

> 62 ... The most serious problem is that seized by the Court of Appeal — the problem of indeterminate liability. If the defendant owed a duty of care to warn the plaintiffs, it is difficult to see why they would not owe a similar duty to a host of other persons who would foreseeably lose money if the rig was shut down as a result of being damaged ...
>
> 63 No sound reason to permit the plaintiffs to recover while denying recovery to these other persons emerges. To hold otherwise would pose problems for defendants, who would face liability in an indeterminate amount for an indeterminate time to an indeterminate class. It also would pose problems for potential plaintiffs. Which of all the

potential plaintiffs can expect and anticipate they will succeed? Why should one type of contractual relationship that of HOOL, be treated as more worthy than another, e.g. that of the employees on the rig? In this state, what contractual and insurance arrangements should potential plaintiffs make against future loss?

64 The plaintiffs propose a number of solutions to the problem of indeterminancy. None of them succeeds in my respectful view. The first proposal is to confine liability to persons whose identity was known to the defendants. This is reversion to the "known plaintiff" test, rejected by a majority of this Court in *Norsk*, *supra*. As commentators have pointed out the fact that the defendant knew the identity of the plaintiff should not in logic or justice determine recovery. On such a test, the notorious would recover, the private would lose: *Norsk*. The problem of indeterminate liability cannot be avoided by arbitrary distinctions for which there is no legal or social justification: *Norsk*, at p. 1112. There must be something which, for policy reasons, permits the court to say this category of person can recover and that category cannot, something which justifies the line being drawn at one point rather than another.

65 Second, and in a similar vein, the plaintiffs argue that determinacy can be achieved by restricting recovery to the users of the rig, a class which they say is analogous in time and even to the owners and occupiers of the building in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85. This argument fails for the same reasons as the known plaintiff test. There is no logical reason for drawing the line at users rather than somewhere else.

66 Third, the plaintiffs attempt to distinguish themselves from other potential claimants through the concept of reliance. The defendants correctly answer this argument by pointing out that any person who is contractually dependent on a product or a structure owned by another "relies" on the manufacturer or builder to supply a safe product.

67 Finally, the plaintiffs argue that a finding of a duty to warn negates the spectre of indeterminate liability as the duty to warn does not extend to everyone in any way connected to the manufactured product. This argument begs the question. The duty to warn found to this point is only a *prima facie* duty to warn in accordance with the first requirement of *Anns*, *supra*, that there be sufficient proximity or neighbourhood to found a duty of care. It is not circumscribed and imports no limits on liability. Considerations of indeterminate liability arise in the second step for the *Anns* analysis. Hence the *prima facie* duty of care, by itself, cannot resolve the problem of indeterminate liability.

85 Here, we have pure economic loss caused by the evacuation order made by City of Estevan officials after the train derailment. The category of persons who suffer economic loss as a result of such an order goes well beyond persons described as plaintiffs in the amended amended statement of claim. An evacuation carries with it, obviously, indeterminate liability. The category of persons who may suffer economic losses is incalculable. The plaintiffs assert that all of the persons who were residents, property owners or lessees of property or employed in the designated area are the persons who suffered losses. But, yet, the plaintiffs also suggest, in their written argument, that the category of plaintiffs who can claim economic loss should be expanded to persons beyond the evacuated area. This suggestion illustrates the obvious problem of indeterminate liability. It is obvious that economic loss may have been suffered by many persons beyond the proposed plaintiffs. Loss may have been suffered by suppliers of evacuated businesses. Loss may have been suffered by consumers who did not reside in the evacuated area, but who frequented the evacuated businesses, and who had to purchase goods elsewhere or spend money travelling a greater distance to do so. Loss may have been suffered by people who had to reroute their normal travel at a cost. Loss may have been suffered by family members or friends of evacuated persons who assisted evacuees, etc.

86 Here, while the residents of the evacuated area are more easily identifiable than the other consumers, suppliers, or others who may have suffered loss as a result of the derailment and evacuation, that does not properly address the problem of indeterminancy. Justice McLachlin, in allowing the claim in *Norsk*, *supra*, in addressing the second branch of the *Anns* test said the following at pp. 1162-1163:

> Nor does the recovery of economic loss in this case open the floodgates to unlimited liability. The category is a limited one. It has been applied in England and the United States without apparent difficulty. It does not embrace casual users of the property or those secondarily and incidentally affected by the damage done to the property. Potential tortfeasors can gauge in advance the scope of their liability. Businesses are not precluded from self-insurance or from contracting for indemnity, nor are they 'penalized' for not so doing. Finally, frivolous claims are not encouraged.

87 The obvious difference between the facts in *Norsk*, *supra*, and the facts as pled here is clear. Here, while the claim attempts to limit the potential plaintiffs, if a duty of care were recognized to persons who suffered economic loss of the nature alleged, the numbers and types of potential plaintiffs would be indeterminate. The categories of plaintiffs would include persons who have been secondarily and incidentally affected. The potential tortfeasor, the defendants, have no way to gauge the scope of their liability, unlike the case in *Norsk*. Those businesses who have insured against such loss would be effectively penalized by the compensation of those who have not. Finally, if the claim was allowed to proceed, frivolous claims would be encouraged.

88 Justice Smith's observations in *Hoffman v. Monsanto Canada Inc.* (certification decision) at para. 73 on the policy considerations relevant in expanding the duty of care for pure economic loss are relevant here:

> 73 In general, the common law has been reluctant to find a duty of care to avoid causing foreseeable pure economic loss, largely for policy reasons. By definition, such losses are not the direct result of the defendant's action. It has been argued that imposition of liability for causing pure economic loss risks exposing the defendant to indeterminate liability ("liability in an indeterminate amount for an indeterminate time to an indeterminate class") and, in a competitive commercial environment, may be "inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage." (*Perre v Apand Pty Ltd.* (1999), 164 A.L.R. 606 (Australian H.C.) per Gaudron J. at paras. 32-33.) Exceptions have been where the courts have found a special relationship, or proximity, such as the case of negligent misstatement, where it can be shown that the defendant claimed special skill or knowledge and the plaintiff, to the defendant's knowledge, relied on the statement of professional negligence.

89 It is my conclusion that the case before me does not present a situation in which the courts would extend the categories for recovery of pure economic loss, for all the policy reasons traditionally cited in support of the exclusion for this recovery are in play in this case.

90 I find that the claims based on negligence for the recovery of economic loss do not assert a reasonable cause of action. The facts as pled fail to establish a duty of care owed by the defendants to the plaintiffs. The claim asserted clearly does not fall within nor is it analogous to any category of cases in which a duty of care has been recognized. The plaintiffs do not allege facts sufficient to allege a relationship of proximity. Moreover, I have concluded that the claim would also fail on the second leg of the *Anns* test, for there are compelling policy reasons for excluding a duty of care in this case.

(c) Does the statement of claim disclose a cause of action for interference with the sacredity of property?

91 The plaintiffs argue that the pleadings in negligence here assert a cause of action known as "interference with the sacredity of property". Paragraph 20 earlier recited sets out the negligence asserted and paragraph 25 c.1 sets out the alleged damage of "scaredity of property" resulting from the alleged negligence:

> c.1 The Derailment caused an interference with the liberty of class members to enter and exit their homes and businesses during times of their choosing and their right to use, enjoy and engage in activities on their property when and as they see fit.

The plaintiffs argue in their brief at paragraph 527, that the above pleadings disclose an environmental class action and the damage that has been sustained is property damage; ie. that the plaintiffs were excluded from their homes and places of business.

92 The plaintiffs' argument in this regard is creative, but wholly unsustainable. There are no pleadings which suggest that this is an environmental claim. There is no pleading which suggests that any anhydrous ammonia escaped from the train or that any pollution, contamination or the like occurred. The plaintiffs have not pled that the defendants breached any environmental legislation. To suggest that this is an environmental class action is a mischaracterization of the facts as pled.

93 The damage claimed by the plaintiffs, which plaintiffs' counsel has coined as "Interference with the Sacredity of Property", is not property damage, but pure economic loss. It is the loss of use and enjoyment of property. I have determined that the claim for pure economic loss is not an authentic cause of action as the previous analysis respecting economic loss has addressed.

94 There is no plausible basis for supposing that the defendants could be liable to the plaintiffs for "interference with the sacredity of property" based on these pleadings.

2. Does the Statement of Claim Disclose a Cause of Action Based on the Rule in* Rylands v. Fletcher *(1866), L.R. 1 Ex. 265 (Eng. Exch.); (1868), L.R. 3 H.L. 330 (U.K. H.L.)?

95 The plaintiffs' claim under the rule in *Rylands v. Fletcher*, *supra*, is set out in paras. 11, 12, 14, 15, 16 and 19:

> 11. The Defendant, Canadian Pacific Railway Limited, is a corporation carrying on business in and under the laws of Canada, headquartered in Calgary, Alberta. The Defendant, Canadian Pacific Railway Company, is a corporation carrying on business in and under the laws of Canada, headquartered in Calgary, Alberta. The Defendants were involved in the Derailment as the operator of the cars, rail line, and equipment involved in the Derailment. At all times material to this claim the said Defendants were the owner or occupier of all of the land in the Designated Area involved in the Derailment.
>
> 12. The Derailment was the derailment of six railway cars off the rail line running through Estevan, Saskatchewan which occurred on or about August 8, 2004 due to the negligence of the Defendants at a railway crossing operated by the Defendants and located at or near 13th Avenue in Estevan, Saskatchewan. The Derailment occurred when the train backed up onto a secondary line.
>
> . . .
>
> 14. Of the six cars which derailed in the Derailment, five contained anhydrous ammonia, which is a hazardous chemical. Three of the cars containing anhydrous ammonia turned on their side.
>
> 15. As a result of the derailment, the Defendants evacuated all residents and businesses within a three-block radius of the Derailment which is the Designated Area.
>
> **The Common Issues**
>
> 16. All of the Plaintiffs and Class Members have in common that each has suffered:
>
> a. Disruption of their personal and social life;
>
> b. The Plaintiffs' safety was endangered;
>
> c. The Plaintiffs have suffered financial loss, *inter alia*:
>
> (a) Cost of alternate accommodation;
>
> (b) Cost of meals outside the home;

(c) Cost of transportation;

(d) Cost of replacement of needed items;

d. Businesses which operated within the Designated Area could not be operated and as a result, the Derailment caused an interruption of business and a loss of income.

e. The Plaintiffs have suffered property loss defined as loss of use and enjoyment of property for a clearly determined amount of time as measured by the period during which the evacuation order was in effect.

f. Economic loss contingent on and associated with the loss described in paragraph 16(e) herein;

. . .

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19a The Plaintiffs rely on the rule in *Rylands v. Fletcher*.

19b The Defendants, for the purpose of transportation of goods in the ordinary course of the operation of its business, brought onto its land anhydrous ammonia which it kept, collected and stored inside of six railroad cars ("Means of Containment").

19c Anhydrous ammonia is likely to do a mischief if it escapes. As a result of the Derailment, said anhydrous ammonia did escape from the railroad tracks on which it was intended to be kept and stored on the Defendants' land.

19d The natural consequences of the escape of the anhydrous ammonia contained within the Means of Containment was that residents would be compelled by legal authority to evacuate their homes and business and prevented or prohibited from entering or returning thereto during the time within which the evacuation order was in force and whether said anhydrous ammonia escaped further from the means of containment in which it was kept or not.

19e Anhydrous ammonia is not to be found on the land possessed or owned by the Defendants on which the railroad is located when the land is in its natural and ordinary state. Transportation of anhydrous ammonia along the railroad tracks is a non-natural use or user of the land and the Defendants are a non-natural user. The harms described in paragraphs 24 and 25 are consequences of the escape of the anhydrous ammonia and the Means of Containment in which it is kept.

19f The Defendants are *prima facie* answerable to pay damages to the Plaintiffs as a result thereof. Said escape was not owing to any default by the Plaintiffs or *vis major* or an act of God and the *prima facie* answerability of the Defendants is not negated or eliminated. The Defendants are liable, no matter how careful they might have been and no matter what precautions they may have taken to prevent the escape of the anhydrous ammonia and the Means of Containment in which it is kept.

19g Alternatively, the train cars themselves were a dangerous machine which were intended to be kept entirely on the track. The Defendants brought the dangerous machines onto their lands and the dangerous machine was likely to do mischief if it escaped from the track on which it was solely intended to be kept within the land of the Defendants and whether it further escaped onto the land or close of another or not.

19h Said dangerous machines did escape, the natural consequences of which was the issuance of the evacuation order and the shut-down of homes and businesses and interference with property, personal, and economic

rights consequent thereon, all of which is not too remote to be recoverable. The Defendants are liable for all the damage resultant therefrom.

96 The value and type of damages claimed by the plaintiffs in relation to the claim under *Rylands v. Fletcher*, *supra*, are set out in paras. 24 and 25:

Damages

24. The Plaintiffs have suffered real and substantial injury, economic loss, and damages arising from the aforesaid acts, omissions, wrong doings, and breaches of legal duties and obligations of the Defendants.

25. By reason of the acts, omissions, wrong doings, and breaches of the legal duties and obligations of the Defendants, the Plaintiffs have suffered injury, economic loss, and damages, the particulars of which include the following:

a. Disruption of their personal and social life;

b. The Plaintiffs' safety was endangered;

b.l. Stress, worry, apprehension of imminent harm, and inconvenience;

c. The Plaintiffs have suffered financial loss, *inter alia*:

(a) Cost of alternate accommodation;

(b) Cost of meals outside the home;

(c) Cost of transportation;

(d) Cost of replacement of needed items;

c.l. The Derailment caused an interference with the liberty of class members to enter and exit their homes and businesses during times of their choosing and their right to use, enjoy and engage in activities on their property when and as they see fit.

d. Business which operated within the Designated Area could not be operated and as a result, the Derailment caused an interruption of business and a loss of income.

e. Exemplary and punitive damages should be awarded in a sum sufficient to impress upon the Defendants and other corporations in the railroad business in Canada and elsewhere, that the judicial system, as one of the three arms of governance in the democracy of Canada, will not permit the Defendants, and others in similar circumstances, to make safety and potentially life and death decisions on the basis that it is cheaper to take risks and pay for the damage, than to take appropriate care. This is particularly so where human harm and loss of life is at issue. Pending discovery and a determination of the probable cause of the Derailment, whether the Derailment was caused by a broken journal on a wheel, a switch problem, rain softening the road which had not been appropriately and recently inspected, line problems flowing from a lack of inspection and replacement, or any of the possible causes of such a derailment, the failure to take corrective action by the Defendants is notable, *inter alia*, regarding exemplary and punitive damages.

(a) Recent similar derailments sometimes involving hazardous products with a similar human potential for endangering employees of the Defendants and others in the area of the rail line are as follows:

(I) A derailment in March/April, 2004 at Secretin. near Chaplin, Saskatchewan on the Swift Current subdivision involving anhydrous ammonia.

(ii) A derailment in December, 2001 in Minot, North Dakota, on the Weyburn subdivision involving anhydrous ammonia and involving loss of life.

(iii) A broken rail incident occurred on the Weyburn subdivision in March of 2002 with a train similarly carrying anhydrous ammonia but there was no derailment because of the handling by the Defendants' operator to split the train, but the pattern of danger, though established, was ignored by the Defendants.

(b) These very similar derailments involving the same hazardous product as the matter at issue in the within litigation, one derailment on the adjacent subdivision, and one derailment and another potential derailment, on the very subdivision in question, should be considered conjunctively with other derailments involving hazardous product and other derailments generally caused *inter alia* by the following factors:

(i) The speery car x-rays of the rails and the teck car x-rays indicate that the Defendants have been running contrary to their standard because of not reducing the speed of the run appropriately, and an increase in frequency of speery car and teck car indicators of danger have been ignored by the Defendants. The Defendants should have been running under standard at lower speeds but this was not done.

(ii) The hotbox frequency similarly shows an increase over the years from the hotbox detectors, yet corrective action has not been taken.

(c) A pattern of cutbacks in personnel employed by the Defendants in track maintenance resulting cumulatively in approximately 50% of the persons involved in track maintenance being laid off, or not replaced in a period of approximately eight years, with the resulting diminution of safety.

(d) Systemically undertaking a deceptive system of reporting of track problems and failures to the Transportation Safety Board. National Transportation Agency, and in Transport Canada reports generally, by an internal valuation of track and related expense as being written off and of little value, so that derailments may be defined as causing damage of amounts manipulated to avoid the necessity of reporting, and the Defendants thereby avoid appropriate scrutiny. Instead the Defendants ought to have been reporting derailments based on the value of clean up, repair, and replacement.

97 The principle of *Rylands v. Fletcher*, *supra*, refers to situations where there can be tort liability for unintended and non-negligent harm, that is strict liability. Justice Smith in *Hoffman v. Monsanto Canada Inc.* (certification decision) succinctly reviewed the principles in *Rylands v. Fletcher*, at paras. 90 and 91:

[90] This claim is based on the principle of law set out in *Rylands v. Fletcher* [(1866), L.R. 1 Ex. 265; (1868), L.R. 3 H.L. 330] (U.K. H.L.). In that case the plaintiff, Fletcher, was mining coal on land adjacent to land owned by the defendant, Rylands, who operated a mill. Rylands, who had no knowledge of the mining operation on the adjacent land, built a reservoir to supply water for the mill. The reservoir gave way and flooded the mining site. Blackburn J., holding Fletcher liable, set out the principle:

> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is primâ facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.... (at pp. 279-80)

> On appeal, the House of Lords, agreeing with the analysis, added the concept of "non-natural use" in the passage that follows at (1868), L.R. 3 H.L. 339 (U.K. H.L.):
>
> > ... if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, — and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable....
>
> [91] Thus, the elements of this cause of action are: (i) the defendant has made a non-natural use of its land; (ii) the defendant brought onto his land something which was likely to do mischief if it escaped; (iii) the substance in question escaped; and (iv) damage was caused to the plaintiff's property or person as a result of the escape. See Klar, Linden, Cherniak & Kryworuk, *Remedies in Tort*, vol. 3 (looseleaf), (Toronto: Carswell, 1987) at 21-16, para. 3; *John Campbell Law Corp. v. Strata Plan 1350* (2001), 8 C.C.L.T. (3d) 226 (B.C. S.C.) per Melnick J. at paras. 21-23.

98 To repeat the elements of a cause of action under the principles in *Rylands v. Fletcher*, *supra*, are: (i) the defendant has made a non-natural use of its land; (ii) the defendant brought onto his land something which was likely to do mischief if it escaped; (iii) the substance in question escaped; and (iv) damage was caused to the plaintiffs' property or person as a result of the escape.

99 The plaintiffs' pleadings here assert that the collection, storage and transportation of anhydrous ammonia is a non-natural use of the land and is dangerous. The pleadings also assert that train cars themselves are dangerous. The pleadings assert that anhydrous ammonia is likely to do mischief if it escapes. The pleadings assert that train cars are likely to do mischief if they escape from the tracks on which they are intended to be kept, whether they escape onto the land of another or not. I am of the view that it is not necessary to decide the question of whether those facts as pled meet the first and second criteria under the *Rylands v. Fletcher*, *supra*, rule, because I am satisfied that the pleadings do not assert facts which meet the third and fourth elements of the cause of action. That is — the pleadings do not allege that the anhydrous ammonia or the train cars escaped, as required, nor do the pleadings allege that damage was caused to the plaintiffs' property or person, as a result of the escape as required.

100 The pleadings here assert that the anhydrous ammonia escaped from the railroad track on which it was intended to be kept. The pleadings also assert that the train cars escaped from the railroad track on which they were intended to be kept. The pleadings do not assert that there was any escape of anhydrous ammonia or of train cars from the defendants' land or control. The pleadings assert that damage was caused to the plaintiffs, which damage included: disruption to their personal and social life; that their safety was endangered, that they suffered stress, worry, apprehension of imminent harm and inconvenience; and, that they have suffered financial or economic loss (paras. 25.a., b., b.1, and c., plaintiffs' statement of claim). There is no pleading or assertion that damage was caused to any plaintiffs' person or property.

101 In examining the authorities and the principles under *Rylands v. Fletcher*, *supra*, it is clear that the "dangerous thing" must escape from the "defendants' land or control" before strict liability under *Rylands v. Fletcher*, can be employed. In *Read v. J. Lyons & Co.* (1946), [1947] A.C. 156, [1946] 2 All E.R. 471 (U.K. H.L.), Lord Chancellor Viscount Simon explained that there has to be an "escape from a place which the defendant has occupation of, or control over, to a place which is outside his occupation or control."

102 Despite this early pronouncement, the plaintiffs point out that many legal commentators have been critical of the "escape" requirement under this strict liability concept. The plaintiffs argue that escape should not mean "escape from

control". Rather, the plaintiffs suggest that the court should adopt a definition that escape means "escape from the place on the defendants' land where the dangerous thing is intended to be kept and where it can only be safely kept". While plaintiffs' counsel is correct in that there has been criticism of the "escape" requirement by legal writers, the requirement that the dangerous thing "escaped from the control of the defendants" remains and is an essential element of a cause of action under the principle of *Rylands v. Fletcher*, *supra*. The plaintiffs have pled no facts which suggest that the anhydrous ammonia and/or the train cars escaped from the property owned or controlled by the defendants. The plaintiffs have pled no facts which suggest that the anhydrous ammonia and/or the train cars escaped in the sense of "escape" as is required by the rule in *Rylands v. Fletcher*.

103 The further issue is whether the type of damages alleged in the claim here can, at law, establish a claim under the doctrine in *Rylands v. Fletcher*, *supra*. As indicated in *Rylands v. Fletcher*, and the cases that have followed, including the references by Smith J. in *Hoffman v. Monsanto Canada Inc.* (certification decision) one of the elements of this cause of action is that damage was caused to the "plaintiffs' property or person as a result of the escape". In the early development of this principle there was question as to whether *Rylands v. Fletcher*, applied only to property damage between adjoining land owners. The law is now clear that the rule in *Rylands v. Fletcher*, also applies to personal injury. G.L. Fridman in *The Law of Torts in Canada*, 2nd ed. (Toronto: Carswell, 2002) states at 224:

> A change has also occurred with respect to the kind of damage remediable in an action based on *Rylands v. Fletcher*. In its origins, the doctrine was confined to damage to land or other property resulting from the requisite escape. Personal injuries were not contemplated as coming within the purview of the doctrine. The present situation is different. Cases in Canada, as elsewhere in the common law world, have recognised that, where appropriate, damages for personal injury may be recovered whether or not there has been concurrent damage to property. Despite *dicta* to the contrary to the House of Lords in 1947, when it was suggested that negligence was a prerequisite for an action for personal injuries that were inflicted unintentionally, there is a respectable body of authority which supports the view that *Rylands v. Fletcher* liability exists for such injuries as it does for other forms of loss caused by the escape of a dangerous thing which has been collected or accumulated by the defendant for his own purposes on his land. This development has been welcomed as making "eminent good sense". Courts should not value property interests over human safety...

104 The law under *Rylands v. Fletcher*, *supra*, has not been extended to cover pure economic loss. There is no allegation in the pleadings that any of the plaintiffs suffered any damage to their property as a result of the escape. The pleadings assert only interference with the plaintiffs' rights to access their property and financial or economic loss. The plaintiffs argue that they suffered property damage because they were evacuated from their property and had a loss of the use and enjoyment of property. Such a characterization of loss of use of property as "damage to property" is a stretch, to say the least. As I have concluded earlier, interference with the right of access to property is simply economic loss. The plaintiffs' claim does not allege damage to property, presumably because none occurred. As noted earlier, presumably the plaintiffs have pled their case as its highest. The damage they allege is pure economic loss.

105 The courts have previously excluded recovery for economic loss under *Rylands v. Fletcher*, *supra*, even where the economic loss flows from property damage. In *Norsk*, *supra*, LaForest J. set out the development of the original narrow rule which excluded recovery for a plaintiff's pure economic loss flowing from the property owner's property damage. LaForest J. referred to *Cattle v. Stockton Waterworks Co.* (1874), L.R. 10 Q.B. 453, [1874-80] All E.R. Rep. 492 (Eng. Q.B.). The *Cattle v. Stockton Waterworks Co.* case involved a claim by a contractor who was making a tunnel on K's land, and the contractor claimed against a wrongdoer to K's land, whose wrong made his contract less profitable. The contractor claimed against the wrongdoer in negligence and the rule in *Rylands v. Fletcher*, *supra*, for loss of profit. LaForest J. said at pp. 1055-1059:

> The original formulation of the rule of the categorical exclusion of economic loss in cases such as *Cattle v. Stockton Waterworks Co.* (1875), L.R. 10 Q.B. 453, was narrow. In its narrow formulation, the rule excludes claims for negligent interference with contractual relations where a third party's property has been damaged and where the

damage to the plaintiff's contractual relations is caused as a result of that property damage. The rule thus applies to exclude recovery for a plaintiff's pure economic loss flowing from the property owner's property damage, damage which I have termed contractual relational economic loss.

(Underlining in original)

. . .

The general principle was stated in *Cattle v. Stockton Waterworks Co.*, L.R. 10 Q.B. 453 ... The reason for the decision appears from the following passage from the judgment of the Court of Queen's Bench which was delivered by Blackburn J., at pp. 457-458, where, after stating that the court would have been glad to avoid giving effect to the rule against permitting the contractor to sue, he went on to say:

> But if we did so, we should establish an authority for saying that, in such a case as that of *Fletcher v. Rylands* (1866) L.R. 1 Ex. 265, the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done. And many similar cases to which this would apply might be suggested. It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But, as was pointed out by Coleridge, J., in *Lumley v. Gye* (1853) 2 E. & B. 216, 252, courts of justice should not 'allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds, which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.' In this we quite agree. **No authority in favour of the plaintiff's right to sue was cited, and, as far as our knowledge goes, there was none that could have been cited**.

It is apparent from that citation that the court in *Cattle's* case regarded the rule as a pragmatic one dictated by necessity.

. . .

These two cases of *Cattle*, L.R. 10 Q.B. 453, and *Simpson*, 3 App.Cas. 279, have stood for over a hundred years and have frequently been cited with approval in later cases, both in the United Kingdom and elsewhere. **They show, in their Lordships' opinion, that the justification for denying a right of action to a person who has suffered economic damage through injury to the property of another is that for reasons of practical policy it is considered to be inexpedient to admit his claim**.

Lord Fraser felt it was unnecessary to refer to all the many cases in which either or both of the cases of *Cattle and Simpson & Co. v. Thomson* (1877), 3 App. Cas. 279, have been cited but he did go on to note the favourable treatment given to the narrow rule in Scotland, Canada and the United States.

. . .

[Emphasis added]

106 Likewise, the pleadings do not allege nervous shock in the form of a recognized psychiatric illness, which would be physical injury. Rather, the pleadings assert stress, worry and interference with psychological security, which as discussed earlier, the courts have refused to recognize as physical injury, because of their very transient and insignificant nature.

107 The plaintiffs' claim does not disclose a reasonable cause of action under the *Rylands v. Fletcher* principle. The pleadings are deficient primarily because the facts do not allege or establish that any dangerous thing escaped nor do they allege that damage was caused to the plaintiffs' property or person as a result of the escape. There is no plausible basis for supposing the defendants could be liable to the plaintiffs' claim under the principle in *Rylands v. Fletcher*.

3. Does the Statement of Claim Disclose a Cause of Action for Assault?

108 The plaintiffs' counsel also argued that the amended amended statement of claim established a cause of action for assault. Counsel argues that the claim alleges that class members experienced "an imminent apprehension of harm" and that this "apprehension of imminent harm" is a claim for assault.

109 The pleadings that the plaintiffs rely upon for the claim of assault must be those contained within the claim for negligence, as the claim does not assert any separate or independent pleading for assault. The claim does assert under the heading "Damages" in paragraph 25b.1 the following:

> 25. By reason of the acts, omissions, wrong doings, and breaches of the legal duties and obligations of the Defendants, the Plaintiffs have suffered injury, economic loss, and damages, the particulars of which include the following:
>
> . . .
>
> b.1 Stress, worry, **apprehension of imminent harm**, and inconvenience.

This is the only pleading that might be relied on to suggest the pleadings allege assault.

110 Plaintiffs' counsel argues in para. 604 of his written brief that the pleadings establish a cause of action for assault:

> **604.** Another advantage in certifying this cause of action is that though it is now apparent that the derailment caused no personal injury, the Plaintiffs can still succeed in their action. The Plaintiffs refer the court to the case of *Kennedy v. Haines*, [1940] O.R. 461, Affirmed [1941] S.C.R. 384 where it was held that even pointing an unloaded gun amounts to an assault. The analogy is that the derailed cars were bombs that were duds. But even dud bombs can be frightening enough to cause a reasonable apprehension of harm in class members.

Plaintiffs' counsel, in his reply brief, at page 17, argues further:

> In response to the objections about the claim in assault. They state that this was not an intentional tort. The approach to the pleadings is obvious. The harm in the tort of assault is the apprehension of imminent harm. What the pleadings have done is take that harm and tagged it onto a recoverable claim in negligence. It is grouped under the same psychological interferences as stress, worry, and nervous shock. Just as there are serious personal injuries like heart attacks leading to death and physical paralysis, there are also bruises and cuts which merit compensation. So, in our respectful submission, do lesser interferences with mental integrity.

111 The position taken by plaintiffs' counsel is very novel. Assault is an intentional tort. It is not a claim recognized in negligence. Even if I were to assume that there is a pleading for assault, which is very questionable, the pleadings do not assert a reasonable cause of action for assault. Assault is the intentional creation of the apprehension of imminent harmful or offensive contact. The conduct must intentionally arouse the apprehension of imminent harm. (Allen M. Linden, *Canadian Tort Law*, 7th ed (Markham, Ontario: Butterworths 2001 45 and 46). There is no pleading, nor did plaintiffs' counsel suggest, that there is anything in the facts as pled which indicate that the defendants intended that the plaintiffs would fear imminent harm. There are no facts pled which indicate that the defendants intended to cause another person to fear imminent contact of a harmful nature. Further, there are no facts pled which indicate that any of the plaintiffs objectively feared imminent physical contact or harm. The pleadings simply do not, in any fashion, support a reasonable cause of action for assault.

4. Does the Statement of Claim Disclose a Cause of Action for the Doctrine of Illegality of Contract?

112 The pleadings assert at paragraphs 23a - 23d, under the heading "Alternative Settlement Mechanism" a claim for what the plaintiffs refer to as "Illegal Contract". Paragraphs 23a - 23d state:

> 23a Beginning within two hours of the Derailment, the Defendants or their authorized agents and employees, including Terry Dahlman, James Andronikos, Dale Cisecki, and Paul O'Donoghue, took steps for the purpose of inducing and which had the effect of inducing class members to enter into an agreement absolving the Defendants of liability arising from the Derailment.
>
> 23b The Defendants contacted class members following the issuance of the original statement of claim with knowledge that the claim had been issued, and actively induced plaintiffs to remove their names from the statement of claim after they had agreed to inclusion of the same pursuant to agreements with class counsel (the terms of which were known to the Defendants), and encouraged potential class members not to participate in the class action and to instead release the Defendants of liability in order to receive immediate compensation. Such compensation was less than what class members would be entitled to pursuant to this claim and did not recognize all types of loss or types of liability that are claimed herein and the Defendants did not inform class members of the same.
>
> 23c The settlement agreements are void and unenforceable or, in the alternative, voidable under the contractual doctrine of illegality as being contrary to the public interest and are in express and/or implied prohibition of the provisions of, and in violation of the purpose and objects of, The Class Actions Act and contrary to the integrity of solicitor/client relations both in their formation and in their performance and thereby injurious to the public good.
>
> 23d The Defendants instituted the settlement plan for the purposes of controlling the costs of their liability, arising out of the Derailment with the intent to deprive class members of enforcement of their legal interests and to minimize the amount of the claims of class members against the Defendants arising from the Derailment and evacuation order.

113 The plaintiffs assert that the settlement contracts entered into between putative plaintiffs and the defendants are void and unenforceable; voidable under the contractual doctrine of illegality as being contrary to the public interest; in express and/or implied prohibition of and in violation of the purpose and objects of *The Class Actions Act*; and, are contrary to the integrity of solicitor/client relations, and thereby injurious to the public good.

114 The doctrine of illegality of contract was examined by the Federal Court of Appeal in *Still v. Minister of National Revenue* (1997), 154 D.L.R. (4th) 229 (Fed. C.A.). The court highlighted the origins of the doctrine as follows:

> [13] The doctrine of illegality is divided into two categories: common law illegality and statutory illegality. The former category has its origins in an unreported case said to have been decided in 1725. In *Everet v. Williams*, a highwayman brought an action in equity to obtain an accounting against his partner. Not only was the suit rejected, but the plaintiff's lawyers were allegedly held in contempt of court, fined and committed to Fleet prison pending payment of the fine: see Note, "The Highwayman's Case (*Evert v. Williams*)" (1893), 9 L.Q. Rev. 197. Invariably, the concept of illegality and its effect on the contractual rights and obligations of parties to an otherwise enforceable agreement is traced to the following passage of Lord Mansfield's reasons in *Holman v. Johnson*, *supra*, at 1121:
>
> > The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant but because they will not lend their aid to such a plaintiff.
>
> [14] As significant as that principle may be to the history and development of the common law notion of illegality, the factual context in which it was made together with the ultimate outcome, is as revealing as the principle itself. The facts of *Holman* are straightforward. The plaintiff, a resident of Dunkirk (France), sold a quantity of tea to the defendant knowing that it was to be smuggled by the latter into England. The tea was delivered to the defendant in

> Dunkirk and the plaintiff brought an action in England to recover monies owing. The defendant purchaser resisted the claim on the ground of illegality. Lord Mansfield held that the plaintiff was entitled to recover the price of the goods. He was not guilty of any offence, nor had he breached any statutory law of England. The plaintiff was free to make a complete contract for the sale of goods in Dunkirk and what the buyer was going to do with the goods was of no concern to that contract. Lord Mansfield noted that had the plaintiff agreed to deliver the tea in England where such goods were prohibited then the defendant would not have been liable for the sale price.
>
> [15] The significance of *Holman* is that it established the general principle (not rule) that contacts can be rendered unenforceable on grounds that they are contrary to public policy ...

115 Professor S.M. Waddams in *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005), discussed the doctrine as follows at p. 395 at ¶558:

> A distinction must be drawn between cases where the court interferes with an agreement as contrary to public policy — the cases of so-called common law illegality — and the cases where the court strikes down an agreement as directly contrary to statute — statutory illegality...

116 As can be seen from the above references, the real nature of the doctrine of illegality is to preclude a cause of action, not provide the foundation for one. Thus, in 7 *Halsbury's Laws of England*, vol. 7, 2nd ed. at 173, (London: Butterworths 1932) para. 248, the effect of the doctrine of illegality is described as follows:

> 248 No action can be brought for the purpose of enforcing an illegal contract either directly or indirectly, or of recovering a share of the proceeds of an illegal transaction, by any of the parties to it. Where the object of a contract is illegal the whole transaction is tainted with illegality, and no right of action exists in respect of anything arising out of the transaction. In such case the maxim *In pari delicto, potior est conditio defendetis* applies, and the test for determining whether an action lies is to see whether the plaintiff can make out his claim without relying on the illegal transaction to which he was a party.

117 At paragraph 608 of the plaintiffs' brief of law, a number of authorities are cited illustrating the application of the doctrine. However, in each one of those authorities, it is clear that the doctrine is employed in refusing to grant relief, on public policy grounds, to a plaintiff suing on an illegal contract. The doctrine of illegality, where properly invoked, goes simply to the enforceability of rights that a plaintiff may otherwise have. It is clear, on the basis of the authorities, that the doctrine of illegality is applicable only in disputes involving the enforcement of rights on the part of a plaintiff, and in particular contracts.

118 In the present case, there is no allegation in the pleadings that a class member has failed to receive the benefit of a bargain made pursuant to the claims compensation procedure. In short, there is no allegation in the pleadings of a breach of contract. The absence of such an allegation removes the doctrine of contractual illegality as a potential cause of action or, as in the authorities, to defend against a breach of contract.

119 A further allegation in the claim is that the settlement agreements are in breach of a statutory duty imposed by the CAA. No specific breaches of the CAA statute are pled. But even if they were pled, it is clear that no reasonable cause of action would be made out on that basis. (See: *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 (S.C.C.); Linden in *Canadian Tort Law*, 7th ed. (Toronto: Butterworths, 2001), at p. 214.)

120 The plaintiffs, in asserting that putative plaintiffs have rights which the court will protect, rely on the decisions in *Lewis v. Shell Canada Ltd.* (2000), 48 O.R. (3d) 612 (Ont. S.C.J.) and *Vitelli v. Villa Giardino Homes Ltd.*, [2001] O.J. No. 2971 (Ont. S.C.J.). But neither of these cases support the plaintiffs' reliance on the doctrine of illegality of contract. In *Lewis*, *supra*, the plaintiff applied by notice of motion for an order restraining the defendants from communicating with putative class members. The court, noting that at least 100 claimants had not yet settled, ordered that Shell provide notice of the class proceeding prior to settling with any potential class member. In *Vitelli*, *supra*, the plaintiffs sought to

enjoin the defendant from communicating with potential class members, including having them sign a petition indicating "I have no desire to be involved in any law suit in any way". *Lewis* and *Vitelli* simply illustrate that courts will protect the procedural rights of putative plaintiffs. The mere existence of those procedural rights does not change the nature of the causes of action asserted against a defendant. These authorities do not suggest that the doctrine of contractual illegality takes on further scope or import merely because it is alleged to affect members of a potential class.

121 The claim does not assert or disclose interference with contractual relations or inducing breach of contract as separate causes of action. In fact, at paragraphs 610 and 611 of their brief the plaintiffs acknowledge that their pleadings do not support either of these recognized causes of action. Rather, the plaintiffs assert that the doctrine of illegality takes on a special status under the CAA. But a proceeding under the CAA does not alter the application of the doctrine of illegality in any way, since the CAA is a procedural, not substantive statute.

122 The plaintiffs assert that the settlement agreements are contrary to the integrity of solicitor/client relations and are, therefore, injurious to the public good and, therefore, void. The plaintiffs provided no authority for such a proposition. But even if there was such authority, the use of such reasoning would not be used to establish a cause of action, but rather to refuse to grant relief on policy grounds.

123 The plaintiffs also assert in the claim that these settlement contracts are void or voidable. However, they do not assert this as a separate and independent cause of action. That is, it is asserted in relation to the plaintiffs' claim in negligence and under the rule in *Rylands v. Fletcher*, *supra* and assault. If there is no cause of action as pled in relation to the derailment and evacuation, it seems to me there is no cause of action about the compensation procedure, as no compensation was owing in law. If there was no entitlement in law to damages for the derailment, there can be no cause of action for a settlement paid to the putative plaintiffs.

124 It may be that the pleading that the settlement agreements are void for public policy would provide a defence to the plaintiffs, if the defendants were suing to enforce the agreements. But there is no cause of action in law for a claim for a void or voidable contract which would give rise to damages.

125 The pleadings do not assert a cause of action for illegal contact.

Conclusion re Causes of Action

126 I would comment at this juncture that the claim as asserted here bears a resemblance to class action claims in other trail derailment and evacuation cases. However, there are major differences between this claim and other train derailment class actions. In those cases, the claims have asserted, or the evidence has established that there has been personal injury and/or property injury as a result of the derailment of the train cars or the escape of some hazardous or polluting materials from the trains. The facts as pled here do not allege any such kind of occurrence. The claim here does not allege facts sufficient to support the causes of action asserted.

127 I have concluded that the pleadings fail to disclose a reasonable cause of action in relation to the common law causes of action in negligence, in strict liability based on the rule in *Rylands v. Fletcher*, *supra*, in assault or for illegal contract.

B. Statutory Requirement 2:

— Is the Court Satisfied That There Is an Identifiable Class?

128 Subsection 6(b) of the CAA requires the plaintiffs to satisfy the court that there is an "identifiable class". Subsection 6(b) reads:

> 6. The court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:

. . .

(b) there is an identifiable class;

"Class" is set out in s. 2 as follows:

"**class**" means two or more persons with common issues respecting a cause of action or a potential cause of action.

129 The plaintiffs have proposed a class defined as

13(a) All persons ... corporations or other entities who were residents, property owners or lessees of property, or were employed in, the Designated Area and were evacuated from or prevented from entering or returning to their homes or places of business or employment in the Designated Area in Estevan, Saskatchewan, as a result of the Derailment and claim to have suffered stress, worry and/or inconvenience, or financial loss as a result of the Derailment... with a separate subclass for those who submitted an Application for Compensation and signed a Final Release form.

130 In *Western Canadian Shopping Centres*, *supra*, the Supreme Court of Canada explained the rational for the requirement of an identifiable class at para. 38 as follows:

38 .... Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria...

131 In *Hollick*, *supra*, the Supreme Court again indicated that the plaintiffs are required to show that the proposed class is defined by objective criteria, which criteria can be used to determine whether a person is a member, without reference to the merits of the action. Justice McLachlin said at para. 17:

17 ... The first question, therefore, is whether there is an identifiable class. In my view, there is. The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited). There is, therefore, an identifiable class within the meaning of s. 5(1)(b): see J.H. Friedenthal, M.K. Kane and A.R. Miller, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater*, *supra*, at pp. 175-76; *Western Canadian Shopping Centres*, *supra*, at para. 38.

132 Winkler J. in *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at para. 10 noted that:

10 The purpose of the class definition is threefold: a) it identifies those persons who have a potential claim for relief against the defendant; b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and lastly, c) it describes who is entitled to notice pursuant to the Act. Thus for the mutual benefit of the plaintiff and the defendant the class definition ought not to be unduly narrow nor unduly broad.

133 Class definition should enable the court to determine whether any person coming forward is or is not a member of the class. The class should be defined in objective terms, without regard to the merits of the claim or the seeking of particular relief. Winkler J. in *Bywater* at paragraph 11 went on to quote with approval from the American *Manual for Complex Litigation, Third* (1995, West Publishing) which indicates that:

> ... Definitions ... should avoid criteria that are subjective (e.g. a plaintiff's state of mind) or that depend upon the merits (e.g. persons who were discriminated against). Such definitions frustrate efforts to identify class members, contravene the policy against considering the merits of a claim in deciding whether to certify a class, and create potential problems of manageability.

134 In the instant case, the proposed class definition would provide an objective basis by which the members of the proposed class could reasonably be identified. The defendants argue that the linking of the class definition to the requirement that such persons "claim to have suffered stress, worry and/or inconvenience, or financial loss as a result of the Derailment" makes the class definition dependent on an examination into the merits of each member of the proposed class. I do not agree with the defendants in this regard. The proposed definition does not require any examination into the merits of the claim. The proposed definition would enable the court to determine whether any person coming forward was or was not a class member. Although it is required that the criteria for identity as a class member be "objective" this does not mean that it cannot involve individual inquiry. They should not, however, depend upon the proof of an individual's state of mind. Here, the geographical parameters, coupled with the requirement that the person(s) were evacuated or prevented from entering or returning to the evacuated area, and that the persons are making a claim, enables the court to determine whether any person is or is not a class member.

135 Likewise, the proposed definition of the subclass for those persons who submitted an Application for Compensation and signed a Final Release form provides an objective basis for the subclass.

136 However, as noted, the existence of objective criteria is not sufficient, in itself, to establish a properly identifiable class. In *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.). Winkler J. pointed out that the mere fact that a group of people is identifiable is not sufficient to render them a class for the purposes of certification. In addition, there must be a rational connection between the proposed class definition, the proposed causes of action and the proposed common issues. In *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.), Winkler J. pointed out that a class cannot exist absent a core element of commonality, which must arise from the cause or causes of action pled.

137 The common issues are based on the representative plaintiff's personal cause of action against the defendants and must extend across the class. An issue cannot be common to a person who does not have a cause of action against the defendant, based on the same facts.

138 Justice Smith in *Hoffman v. Monsanto Canada Inc.* (certification decision), discussed the issue of class definition and its interrelationship with the common issues, and the causes of action extensively at paras. 208-213:

> [208] Both principles, that the class definition must bear a rational relationship to the cause of action and the proposed common issues (and therefore must not be unreasonably over-inclusive or under-inclusive), and that the representative plaintiffs must establish an evidentiary basis to permit the factual conclusion that such a class exists, were upheld by the Supreme Court of Canada in *Hollick v. Toronto (City)*, *supra*, a case involving a claim in nuisance against the city in relation to noise and pollution from a landfill, sought to be certified as a class proceeding on behalf of a class of some 30,000 other residents who lived in the vicinity of the landfill. McLachlin C.J.C. commented as follows:
>
> > ... The first question ... is whether there is an identifiable class. In my view, there is. The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member or the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited)....
> >
> > A more difficult question is whether "the claims ... of the class members raise common issues", as required by s. 5(1)(c) of the *Class Proceedings Act, 1992*....

> In this case there is no doubt that, if each of the class members has a claim against the respondent, some aspect of the issue of liability is common within the meaning of s. 5(1)(c). For any putative class member to prevail individually, he or she would have to show, among other things, that the respondent emitted pollutants into the air. At least this aspect of the liability issue (and perhaps other aspects as well) would be common to all those who have claims against the respondent. The difficult question, however, is whether each of the putative class members does indeed have a claim — or at least what might be termed a "colourable claim" — against the respondent. To put it another way, the issue is whether there is a rational connection between the class as defined and the asserted common issues...
>
> The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. Little has been said about this requirement because, in the usual case, the relationship is clear from the facts. In a single-incident mass tort case (for example, an airplane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who owned the stock). In a case such as this, however, the appropriate scope of the class is not so obvious. It falls to the putative representative to show that the class is defined sufficiently narrowly.
>
> The requirement is not an onerous one. The representative need not show that *everyone* in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not *unnecessarily* broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended....
>
> The question arises, then, to what extent the class representative should be allowed or required to introduce evidence in support of a certification motion....
>
> . . .
>
> I agree that the representative of the asserted class must show some basis in fact to support the certification order.... In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action.... (at paras. 17-25)

[209] In *Hollick*, the Chief Justice concluded that the representative plaintiff had met the evidentiary burden of establishing the existence of a common class. He had submitted 115 pages of complaint records documenting almost 300 complaints between July 1985 and March 1994, 200 complaints in 1995, and 150 complaints in 1996. The Chief Justice concluded that while it was difficult to determine exactly how many separate complaints were brought in any year, it was clear that many individuals besides the appellant, from many different areas within the specified boundaries, were concerned about noise and physical emissions from the landfill.

[210] The Chief Justice nonetheless concluded that a class proceeding was not the preferable procedure, largely because any common issue in the case would be negligible in relation to the individual issues, pointing out that it was likely that some areas were affected more seriously than others, and some areas were affected at one time while other areas were affected at other times. Some class members were close to the site, others far away. She concluded: "Once the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action." (at para. 32)

[211] As these and other cases indicate, the requirement of a rational connection between the class definition and the proposed causes of action and common issues is an issue that overlaps the two criteria for certification in s. 6(b)

> and (c): that there be an identifiable class and that the claims of the class members raise common issues. It is referred to by McLachlin C.J.C. in *Hollick*, for example, as the "commonality requirement" and is dealt with in a discussion that incorporates the two questions, whether the claims of the class members raise common issues, and whether the class is defined sufficiently narrowly. This discussion *follows* the Court's earlier conclusion that there was in that case an "identifiable class". Nonetheless, it is clear that, however one classifies the issue, in addition to offering a class definition that would permit objective determination of whether an individual is a member of the class, the proposed representative plaintiff must provide evidence that the class members, so identified, have, in common, the claims alleged in the statement of claim.
>
> [212] Problems associated with perceived lack of rational connection, or lack of commonality, are also frequently seen as relevant to the further requirement for certification, that a class proceeding be shown to be the preferable procedure. Thus, the more the interests and issues among the members of the identified class are seen to vary from individual to individual, the less likely is the Court to conclude that a class proceeding is the preferable procedure for resolving the conflicts. See for example, *MacDonald (Litigation Guardian of) v. Dufferin-Peel Catholic District School Board* (2000), 20 C.P.C. (5th) 345 (Ont. S.C.J.), where, on an application to certify a claim in relation to mould contamination on behalf of approximately 22,000 students in 1000 portable classrooms in 120 schools, (and where the certification judge was not satisfied that there was widespread illness caused by the mould), certification was rejected on the basis that a class proceeding was not the preferable procedure because of the difficulty of separating common issues from individual ones.
>
> [213] Accordingly, there is some inevitable overlap in the discussion of these three criteria for certification. Nonetheless, I have concluded that it is possible to separate the question of whether there is a rational relationship between the proposed class definition and the claims raised by the statement of claim from the questions discussed in the next section of this judgment, whether the "common issues" proposed by the representative plaintiffs satisfy that requirement for certification. The question raised at this point, in my view, is the question of the extent to which the proposed class definition is related to the two principal claims in the statement of claim...

139 Here, it must be noted that the analysis on identifiable class must proceed on the presumption that my conclusions respecting cause of action are wrong. If there is no cause of action there can be no rational connection between the class members and the causes of action, as no class member would have a colourable claim.

140 The question is then, what evidence is there, on this application, that members of the class have, in common, suffered the losses claimed? The evidence filed by the plaintiffs in relation to the individual claims is somewhat limited. Eugene Babychuk deposed he suffered out-of-pocket expenses and two days loss of employment. He deposed he believed 150 people were evacuated, but thought the class would include 75 members. Glenn Stepp deposed that he incurred out-of-pocket expenses and loss of income. Glenn Hanson, while deposing he was evacuated, does not depose that he incurred any expenses, but deposes he wants to claim for loss of use of his property and for abuse by the police. Nick Cunningham deposes that he incurred significant inconvenience that he wants to be compensated for. Attached as exhibits to Mr. Cunningham's affidavit are letters from approximately five other persons who indicate they suffered financial loss and two people who said they were worried. There was no evidence of any claim by any person who received compensation from the defendants and who signed a settlement agreement and a release.

141 I would also note that the plaintiffs filed the affidavit of Kerry Gilroy in support of the certification application. However, on April 20, 2005 plaintiffs' counsel wrote to the local registrar stating the following:

> I believe there are inaccuracies in the affidavit of Kerry Gilroy and we will not be relying on portions of the affidavit.

Counsel for the plaintiffs did not clarify which portions of the affidavit of Kerry Gilroy were inaccurate. In fact, counsel made no reference to the affidavit in argument and did not suggest the affidavit should be relied on in any respect. I have not relied on the affidavit of Kerry Gilroy.

142 Here, there is evidence of some persons who were evacuated or restrained from returning to their homes or businesses who incurred expenses from the evacuation order, loss of income and one person who claimed being worried, and of one wanting to claim for loss of use of property. In that respect it may be said that there is an evidentiary basis to support the conclusion that a class exists, or perhaps several classes exist, which each have suffered the types of losses claimed.

143 However, there is no evidence of any person claiming that they were deprived of their legal interests because of the settlement agreements. There is no evidence there is a class of more than one person who share a common claim pursuant to the settlement agreements. It is my conclusion that there is no evidence that this claim is shared by members of the proposed sub-class.

144 Here, if it could be said that the claim disclosed an authentic cause of action, I would conclude that there is an identifiable class in relation to the claims for economic loss and stress.

145 However, the difficulty is that the proposed class members are not evidentially linked to the proposed common issues, because there is no genuine cause of action asserted in the amended amended claim. As the Saskatchewan Court of Appeal stated in *Toms Grain & Cattle Co. v. Arcola Livestock Sales Ltd.*, 2006 SKCA 20, [2006] S.J. No. 93 (Sask. C.A.), at para. 28:

> ¶28 However, the mere fact that a group of people is identifiable is not sufficient to render them a class for the purpose of a class action. In addition, there must be a rational connection between the proposed class definition, the proposed causes of action and the proposed common issues. **In effect, the class description must describe persons who in fact have a claim asserted in the statement of claim. This has often been interpreted to mean that all members of the proposed class must have at least a colourable claim** and that the class definition should not be over-inclusive or under-inclusive, sweeping in those who do not have a claim against the proposed defendants or arbitrarily excluding others who share the same cause of action... In addition, the application for certification must provide a minimum evidentiary basis for the court to be satisfied that there is a class of more than one person who share the common claim. Both requirements, that the class definition must bear a rational relationship to the causes of action certified in the proposed common issues (and therefore must not be unreasonably over-inclusive or under-inclusive), and that there be an evidentiary basis supporting the factual conclusion that such a class exists (i.e., that all the members of the class have suffered the loss claimed) were upheld by the Supreme Court of Canada in *Hollick*, *supra*.
>
> [Emphasis added]

It cannot be said here that any of the proposed members of the proposed class have a colourable claim, as none of the matters asserted in the amended amended statement of claim identify any genuine cause of action. If I am in error in my conclusion in relation to the causes of action, I would conclude that there is an identifiable class in relation to the claims for economic loss and stress. However, the plaintiffs have failed to provide a factual basis upon which I can conclude there is an identifiable class in relation to the claims asserted based on the compensation contracts.

C. Statutory Requirement 3:

— Is the Court Satisfied that the Claims of the Class Members Raise Common Issues?

146 Section 6(c) of the CAA requires that the court be satisfied "that the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members". "Common issues" is defined in s. 2 of the CAA:

> **2** In this Act
>
> . . .

"**common issues**" means:

(a) common but not necessarily identical issues of fact; or

(b) common but not necessarily identical issues of law that arise form common but not necessarily identical facts.

147 The plaintiffs, in the notice of motion for certification, have sought certification of the following proposed common issues (which are not the same as the common issues identified in paragraph 16 of the amended amended claim):

1. Why did the train fall off the tracks?

2. Did the Defendants owe a duty of care to the class members or some of the class members, and if so, to whom and with respect to what types of loss? Namely,

i) To a class or classes of persons inside the evacuated area?

ii) To a class or classes of persons outside of the evacuated area?

3. Under all of the circumstances what was the standard of care expected of the Defendants, and did it breach the standard of care?

4. Under all of the circumstances, are the Defendants liable under the rule of *Rylands v. Fletcher*? Namely,

i) Is the train or the anhydrous ammonia a thing likely to do mischief if it escapes?

ii) Did the train or the anhydrous ammonia escape within the meaning of the jurisprudence?

iii) If so, what are the natural consequences of the escape of the train or the anhydrous ammonia;

5. If the Defendants are liable under the rule of *Rylands v. Fletcher*, is an aggregate monetary aware appropriate for some or all of the types of losses claimed for, and if so, how much and how is it to be distributed?

6. Can those who signed the Application for Compensation and Final Release recover an additional amount or amounts from the defendants over and above what they have already received, and if so, why?

7. Under all of the circumstances in relation to this and other derailments of the trains of the Defendants and any other relevant considerations, is an award of punitive damages appropriate?

8. What effect, if any, did the intervention of the non-defendants have on the liability of the Defendants?

148 The question of whether any of these issues presents a common issue is tied to the earlier findings of whether the pleadings disclose a reasonable cause of action and whether there is an identifiable class. Justice Smith in *Hoffman v. Monsanto Canada Inc.* (certification decision) was faced with a similar issue. Her comments on the common issue analysis at paras. 249 to 250 are relevant:

[249] It is clear that the question of whether any of these issues presents a common issue raised by the "claims of the class members" is closely tied to earlier findings in relation to (1) whether and to what extent the pleadings disclose a reasonable cause of action (for that affects what "claims" may be relevant to certification) and (2) whether there is an identifiable class. Issues can be common only insofar as they are relevant to a reasonable cause of action arising from the pleadings and they cannot be issues common to "the claims of class members" unless and to the extent that there is an identifiable class. Thus, the question of whether the plaintiffs have identified "common issues" arises only on the assumption that a number of my earlier determinations are erroneous. In particular, if there is no identifiable

> class, there can be no common issues, and where a particular pleading fails to disclose a reasonable cause of action, any issue relevant only to that particular pleading will not be pertinent to the claim of any class member...
>
> [250] In general, the Supreme Court has held that an issue will be common only where its resolution is necessary to the resolution of each class member's claim, and where the issue is a "substantial ingredient" of each of the class members' claims. The Court is to apply this test "purposively", bearing in mind that the principal question is whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis. (See *Hollick*, *supra*, at para. 18, quoting from the Court's earlier decision in *Dutton*, *supra*, at para. 39.)

149 Nordheim J. in *Pearson v. Inco Ltd.* (2002), 33 C.P.C. (5th) 264 (Ont. S.C.J.) said the following about the common issue analysis at para. 104:

> 104 The question on a motion for certification is not simply whether there are common issues raised by the claims advanced. There will always be common issues raised by any common event, otherwise presumably no one would suggest that the ensuing action could ever be treated on a class basis. Instead, the issue is whether the resolution of the proposed common issues sufficiently advances the overall determination of liability so as to justify the certification of the action as a class proceeding. An important consideration is[sic] this regard is whether any individual issues that will remain for determination after the common issues are resolved are limited or whether what remains to be determined is sufficiently extensive that the determination of the common issues essentially marks the commencement as opposed to the completion of the liability inquiry...

150 As is clear, the question of whether the plaintiffs have identified common issues arises only if my earlier determinations with respect to the causes of action are wrong, as issues can only be common if they relate to a reasonable cause of action. Further, they cannot be common to the claims of class members if there is no identifiable class, because there is no cause of action. Assuming my earlier findings were erroneous, one could conclude the proposed common issues 1, 2(i), 3, 4, 5, 7 and 8 asserted in the plaintiffs' motion for certification and recited earlier do raise issues common to the proposed class members. While the proposed issues are not articulately posed, the fact of the derailment is common to all potential class members. As *Pearson*, *supra*, noted, common issues are often raised by a common event. In that result it can be said there are common issues. The legal duties owed to the proposed plaintiffs; the liability questions relating to the cause of the occurrence; whether the defendants breached duties owed to persons in the vicinity of the derailment; is there strict liability and the types of damages incurred (which are referred to in 1, 2(i), 3, 4 and 5), could be said to be common issues. The defendants' liability could be determined on a class-wide basis because the claims arise from a single event with a common nucleus of facts. In the absence of a class action, each claimant would be required to prove the facts surrounding the derailment, the railroad's history of operations, the railroad's alleged breach of duty and the causal connection between the derailment and the types of injuries claimed. The differences between the amounts of individual's damages and types of damages relating to economic loss are inevitable in almost any class action and should not be a bar to certification. As well, numerous courts have certified the question of punitive damages as a common issue prior to establishing the existence of compensatory damages for individual class members. See *Chace v. Crane Canada Inc.* (1997), 14 C.P.C. (4th) 197 (B.C. C.A.) at para 24, *Hollick v. Metropolitan Toronto (Municipality)* and *Rumley v. British Columbia*, *supra*. These issues appear to be common.

151 However, the issues respecting damage for stress and worry cannot be said to be common. Such issues would be unique to each individual claimant, depending on their background, personal circumstances, health, etc. They would not be common across the class or even a sub-class of persons claiming this type of loss.

152 As well, the issue recited in 2(ii) of whether "Did the Defendants owe a duty of care to the class members or some of the class members, and if so, to whom and *with respect to what types of loss to a class or classes of persons outside of the evacuated area*?" is not a common issue. The question poses the issue of what type of loss would the defendants be liable for in relation to persons outside the evacuated area. The answer to the question of whether there is a duty to persons outside the evacuated area would not be common or even relevant to the members of the class, as the class is limited to persons who were evacuated. It could not be said the issue would resolve any of the class members' claims.

153 Likewise, the issue recited in question 6: "Can those who signed the Application for compensation and Final Release recover an additional amount or amounts from the defendants over and above what they have already received, and if so, why?" cannot be said to be a common issue either. The inquiry of whether persons who signed the Final Release can obtain additional compensation cannot be said to be common to all of the persons in the proposed sub-class because the resolution of the issue for one sub-class member would not necessarily resolve the issue for each and all of the sub-class members. The nature, extent and understanding of the negotiations or interaction between the sub-class members and the defendants would have to be examined for each sub-class member. While the Application and Final Releases are the same for each sub-class member, evidence would have to be produced to establish how each sub-class member learned of the compensation offer, what discussions took place between the individual and the defendants' representative before the Final Release was executed and compensation paid. It could not be said that allowing the action to proceed as a class action would avoid duplication of fact finding or legal analysis in relation to this proposed common issue. It is not an issue common to the sub-class.

154 There are no common issues proposed with respect to the asserted cause of action for assault.

155 The common issues proposed by the plaintiff with the exception of the damages for stress and worry, whether the defendants owed a duty to persons outside the evacuated area (2(i)) and whether additional compensation can be paid to persons who signed a final release (6) constitute common issues, were it found that the pleadings disclosed an authentic cause of action.

156 However, in the final analysis, the question of whether the plaintiffs have satisfied the requirement to identify common issues is inextricably tied to my earlier findings in relation to whether the pleadings disclose any reasonable cause of action. All of the proposed common issues relate to proposed causes of action that I have rejected as not being reasonable causes of action. As such, if there is no cause of action identified by any potential class member, there can be no common issues.

D. Statutory Requirement 4:

— Is the Court Satisfied a Class Action Is the Preferable Procedure?

157 Subsection 6(d) requires that the court be satisfied on an application for certification that a class action would be the preferable procedure for the resolution of the common issues. Section 9 of the CAA is relevant to this criterion, providing as follows:

> 9. The court shall not refuse to certify an action as a class action by reason only of one or more of the following:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members of the identity of each class member is not ascertained or may not be ascertainable;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all the class members.

158 The purposes of class proceedings and the relationship of these purposes to the issue of preferability was discussed by the Supreme Court in *Hollick*, *supra* at para. 15:

> ... class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public...

159 The court in *Hollick*, *supra*, went on to make the following comments on the concept of preferability:

> 27 ... in the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions - judicial economy, access to justice, and behaviour modification: see also *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (2d) 453 (Div. Ct.) compare British Columbia *Class Proceedings Act*, s. 4(2) (listing factors that court must consider in assessing preferability)...
>
> 28 The Report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": *Report of the Attorney General's Advisory Committee on Class Action Reform*, *supra*, at p. 32. In my view, it would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and manageable method of advancing the claim" without looking at the common issues in their context.
>
> 29 The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the common issues" (emphasis added), and not that a class action be the preferable procedure for the resolution of the class members' claims. I would not place undue weight, however, on the fact that the Act uses the phrase "resolution of the common issues" rather than "resolution of class members' claims". As one commentator writes:
>
> > The [American] class action [rule] requires that the class action be the superior method to resolve the "controversy." The B.C. and Ontario Acts requires that the class proceeding be the preferable procedure for the resolution of the "common issues" (as opposed to the entire controversy). [This] distinctio[n] can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.
>
> See Branch, *supra*, at p 4.690. I would endorse that approach.
>
> 30 The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues "predominate" over the individual issues.... I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General's Advisory Committee put it, the preferability requirement asks that the class representative "demonstrate that, given all the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings" ...

While these passages were written in relation to the Ontario statute, Justice Smith in *Hoffman v. Monsanto Canada Inc.* (certification decision) applied the principals to the Saskatchewan statute which is largely based on the Ontario Act.

160 Again, it is difficult to address the issue of preferability in view of my earlier findings that the pleadings do not disclose a reasonable cause of action. If I am in error on any of those findings, the analysis of whether a class action is the preferable procedure could be affected.

161 In considering the issues of judicial economy and of access to justice, one must consider what would be gained from determining these issues in a class action. With regard to questions of fact, there would be some advantage in relation to judicial economy and access to justice to have the issue of why the train derailed determined in a single procedure.

162 The issues involving strict liability and duty of care, while questions of law, also contain significant factual elements and would involve some, albeit not extensive, individual inquiry. The issues of foreseeability and proximity under duty of care would have to be examined somewhat individually depending on the individual plaintiff. Those issues could, alternatively, be examined by classes of plaintiffs. For example, it may be that persons living beside the rail line may be owed a duty of care, while others living blocks away are not owed a duty. Alternatively, it may be that persons claiming economic loss are owed a duty of care, while those claiming stress are owed a different duty or no duty. The issues of whether anything dangerous escaped could be resolved in a single proceeding and likewise the damage issues flowing from strict liability might be resolved by classes of plaintiffs.

163 As I indicated, in the analysis of the criterion of common issues, were it possible to find a cause of action, some of the issues could be certifiable as common issues. In relation to those common issues, there would be individual issues that would remain and they would involve inquiry, as the individual claimants would have to prove that they suffered loss and the value of the loss. Depending on the type of loss claimed, the resolution of those issues may be amenable to a simple procedure. For example, proof of hotel and food expenses and loss of wages incurred would be amenable to a simple procedure. Other types of loss, such as stress and worry would not be amenable to a simple procedure. Those issues require inquiry into all the circumstances of each claimants' personal circumstances, family, work obligations and health and, in respect of nervous shock, would likely require expert medical evidence. A class action would not be preferable. Likewise, on the issues involving persons who received compensation and signed a final release, those issues involve individual inquiry into the formation of the contract and would not be amenable to a simple procedure for the same reasons.

164 While I conclude that a class action would be a preferable procedure in relation to some of the common issues, it would not be preferable for all and that in some respects significant individual inquiry would prevail.

E. Statutory Requirement 5:

— Is the Court Satisfied there is an Adequate Representative Plaintiff?

165 Pursuant to s. 6(e) of *The Class Actions Act*, the court must be satisfied that:

> (e) there is a person willing to be appointed as a representative plaintiff who:
>
> (i) would fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interest of the other class members.

166 In *Western Canadian Shopping Centres Inc. v. Dutton*, *supra*, the court said at para. 41:

> 41 Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: see Branch, *supra*, at paras. 4.210-4.490; Friedenthal, Kane and Miller, *supra*, at pp 729-732.

167 In *Scott v. TD Waterhouse Investor Services (Canada) Inc.*, 2001 BCSC 1299, 94 B.C.L.R. (3d) 320 (B.C. S.C.), these comments were made at paras. 153-154:

> ¶153 The essential nature of the litigation process does not change because a proceeding is certified as a class proceeding and a case management judge is appointed. The parties to the law suit must conduct any necessary investigations and collect and present the evidence to the court. The judge plays no investigative role and no role in obtaining evidence. Though the case management judge must give directions of a procedural nature, it is the parties, not the court, who are responsible for carrying out the directions.
>
> ¶154 A representative plaintiff must perform those roles on behalf of the class. The representative plaintiff must, therefore, be in a position to "vigorously prosecute the claims": *Campbell v. Flexwatt* (1997), 44 B.C.L.R. (3d) 343 (C.A.). To do so they must present a case management plan.

168 Justice Tallis in *Hoffman v. Monsanto Canada Inc.*, 2002 SKCA 120, 227 Sask. R. 63 (Sask. C.A.) describes a representative plaintiff as a fiduciary at para. 16:

> [16] ... When a plaintiff sues on behalf of a class he assumes a fiduciary obligation to members of the class, surrendering any right to compromise a group action for his individual gain or advantage. Even if a named plaintiff receives all of the benefits that he seeks in the claim, such success does not relieve him of the duty to continue the action for the benefit of others similarly situated...

169 Here, the certification application again breaks down. There are problems with the proposed representative plaintiffs.

170 The amended amended claim names William Brooks, Sam Kinert, Rob Peter, Glenn Stepp, Lorraine Supple, Bill Weichert, John Doe 1, John Doe 2, Jane Doe 1, Jane Doe 2 as plaintiffs. None of these persons named in the claim as representative plaintiffs (other than Glenn Stepp) were proposed by plaintiffs' counsel as the representative plaintiff. Rather, plaintiffs' counsel submitted that Nick Cunningham should be appointed as the representative plaintiff. Class counsel went on to submit that if the court did not find Nick Cunningham appropriate, then it should appoint Glenn Stepp. Counsel submitted further that if Glenn Stepp were not appropriate, then Eugene Babychuk should be appointed.

171 As stated earlier, the defendants had previously brought a motion to strike the named plaintiffs, William Brooks, Sam Kinert, Rob Peter, Glenn Stepp, Lorraine Supple, Bill Weichert, John Doe 1, John Doe 2, Jane Doe 1 and Jane Doe 2. as representative plaintiffs With the exception of Glenn Stepp, none of the persons named in the claim as representative plaintiffs have filed an affidavit. There is no information provided from any of them upon which a judgment can be made about the suitability of those persons to serve as a representative plaintiff. The named John and Jane Does are persons unknown to plaintiffs' counsel, who may be members of the class. None of the representative plaintiffs, other than Glenn Stepp, say they are prepared to serve as a representative plaintiff. In fact, Rob Peter, as admitted by plaintiffs' counsel, asked to have his name withdrawn as a plaintiff. Leaving aside Glenn Stepp for the moment, I reject all of the named plaintiffs as possibilities. As I have found none of the named plaintiffs (leaving aside Glenn Stepp) are appropriate as representative plaintiffs, I do not find it necessary to deal with the defendants' earlier application to strike the named plaintiffs.

172 I intend now to deal with plaintiffs' counsel's suggestion that either Cunningham, or Stepp or Babychuk should be appointed as the representative plaintiff. Those were the three individuals who counsel suggested to the court should be appointed as the representative plaintiff. It must be remembered also, that counsel suggested that the court should firstly consider Mr. Cunningham, but if he was not appropriate, then Mr. Stepp, but if he was not appropriate then Mr. Babychuk.

173 I will consider Mr. Cunningham first. Mr. Cunningham is not named in the claim, although one might argue the plaintiffs could apply to further amend the claim to name him as a representative plaintiff.

174 Mr. Cunningham, in his affidavit sworn on August 5, 2005, deposes at para. 4:

> 4. At the time that the Derailment occurred in Estevan, I was renting my sister's house. The address was 1321 - 8 th Street. This was approximately one short block from the point of derailment.

While Mr. Cunningham does not directly attest in paragraph 4 that he was evacuated from his home, or that he was within the evacuation area, or that he was restrained from returning home, he does appear to imply that his home was within the area of evacuation and was subject to an evacuation order. This implication is reinforced when one refers to paras. 22, 24, 28 and 29 of Mr. Cunningham affidavit:

> 22. Later on that night, I became aware of the evacuation order that was in place for the North side of the tracks from television and radio reports...
>
> 24. I do not know whether police or other local authorities knocked on my door. If they did, I slept through the whole thing.
>
> . . .
>
> 28. It took approximately one half hour from the time that I called my parents to the time that we were able to fully evacuate my home. I did not know how long the evacuation order would be in place or what I should take with me.
>
> 29. While the evacuation order was in effect, I stayed at my parent's house and they fed me....
>
> 35. As I left the evacuated area, I noticed that the evacuation stopped around 9 th Street...

175 In paragraph 90, Mr. Cunningham deposes that he works part-time at Deuce Electric.

176 In paras. 10 and 11 Mr. Cunningham sets out his interest in being a representative plaintiff:

> 10. I am aware that Glen[sic] Stepp and Eugene Babychuk have indicated a willingness to be appointed as Representative Plaintiffs in this matter. I would be willing to have them represent my interests in this matter and do not believe I have a conflict of interest on the common issues with either Mr. Stepp or Mr. Babychuk. I am also willing to be a Representative Plaintiff.
>
> 11. I am also willing to be a Representative Plaintiff for the sub-class of persons who had signed an agreement with the CPR. I do not believe that a separate Representative Plaintiff is necessary for that subclass. Class counsel has informed me, and I do believe to be true, that a separate representative plaintiff from that subclass may put them in breach of contract and that would be contrary to their best interests. One can be appointed later, if the court thinks I am unable to fairly and adequately represent their interests.

177 The first step in determining whether Mr. Cunningham should be a representative plaintiff is to refer to the definition of the class. The class is defined as:

> All persons ... who were residents, property owners or lessees .... and were evacuated from or prevented from entering or returning to their homes ... in the Designated Area...

The "Designated Area" is defined in paragraph 15 of the amended amended claim as "a three-block radius of the Derailment".

178 The affidavit of James Andronikos filed, on behalf of the defendants, indicates that Mr. Cunningham's residence was not within the zone of evacuation. That is, Mr. Cunningham's home was not subject to an evacuation order. According to the evidence of Mr. Andronikos, Mr. Cunningham's residence is on the north side of 8 th Street in Estevan and only residents located on the south side of 8 th Street were subject to the formal evacuation order. While the affidavit of Mr. Andronikos does indicate that access to the 13 block of 8 th Street was restricted during the period of the evacuation order, by the placement of non-permanent barricades, Mr. Andronikos also attests that residents who wanted to go to their residences on the north side of the street (where Mr. Cunningham lived) were able to access their residences.

179 Further, the affidavit of Mr. Andronikos indicates that Mr. Cunningham's employer, Deuce Electric was not within the evacuated area and that Deuce Electric carried on business during the period of evacuation. The affidavit of Mr. Andronikos indicates that Mr. Cunningham was not among the residents whose compensation claims were settled by the defendant. That is, Mr. Cunningham did not enter into a settlement agreement arising out of the derailment and evacuation.

180 Mr. Cunningham did not reply, or ask to reply to the affidavit of Mr. Andronikos to contradict the evidence that he was not living in the evacuated area. He did not reply to the evidence which indicated that he was not evacuated from his home. Mr. Cunningham did not respond to Mr. Andronikos' affidavit which indicated that Mr. Cunningham's employer, Deuce Electric, was not affected by the evacuation order. Further, Mr. Cunningham did not attest in his affidavit that he had entered into a settlement agreement with the defendant, nor did he file a response to indicate that he was a person who had a settlement agreement with the defendants.

181 The evidence indicates Mr. Cunningham does not fall within the scope of the proposed class or sub-class identified by the plaintiffs. Plaintiffs' counsel argued that Mr. Cunningham has a colourable claim as "a duty of care may be found to be owed to those on the border or outside of the evacuated area". However, the class proposed by the plaintiffs does not extend to such persons. Expanding the class definition would expose the class to problems of indeterminate liability and may impact the viability of the class definition. Class counsel also suggests that s. 4(4) of the CAA allows the court to appoint a non-class member as a representative plaintiff. However, that has only been done in circumstances to avoid a substantial injustice, such as in circumstances were a putative class suffers from a legal disability. Such is not the case here.

182 Mr. Cunningham is not a person who falls within the class definition. His interest in the prosecution of the claim may conflict with the putative class members who are actually members of the defined class. The prosecution of his claim would undermine the integrity of the class definition, relied on by the plaintiffs to define the class and support their cause of action. That would conflict with the interests of the class.

183 I would also note that Mr. Cunningham does not specifically indicate anywhere in his affidavit that he has seen the proposed Notice or Litigation Plan. Perhaps I could assume he has seen the litigation plan because in paragraph 83 of his sworn affidavit he suggests that there be added to the Litigation Plan a method of notifying class members similar to paragraphs 22, 23, 24 32, and 33 of the affidavit of James Andronikos. Mr. Cunningham has not indicated any steps that he has taken to prosecute this claim.

184 Mr. Cunningham is not an appropriate person to be the representative plaintiff. He does not share the basic factual circumstances giving rise to the cause of action alleged to be shared by the class members and/or the sub-class members and his interests would potentially conflict with the interests of the class.

185 I now turn to Mr. Stepp. Mr. Stepp was named in the action as a representative plaintiff. Mr. Stepp deposed that he did reside within the evacuated area. He also deposes he worked within the evacuated area and was unable to go to work because of the evacuation. He estimates his loss, with respect to alternate accommodation and loss of wages, to be $260.00. He also claims emotional stress. The evidence indicates he falls within the class.

186 However, in examining the evidence, I am of the view Mr. Stepp does not have the attributes which are required to effectively serve as a representative plaintiff. Mr. Stepp has not been put forward as the first plaintiffs' choice for representative plaintiff. Nor has it been submitted that he should act together with the first choice, Mr. Cunningham. One questions his willingness to vigorously prosecute the claim in light of this.

187 The affidavit of Glenn Stepp purports to have materials attached to it in paragraph 23, such materials being the draft Notice of Certification and draft Litigation Plan. Neither of those exhibits were attached to the affidavit and one questions whether in fact Mr. Stepp has reviewed the Notice and Plan. Further, the proposed class definition proposed by Mr. Stepp in his affidavit, is not the definition proposed by plaintiffs' counsel on the application. It seems obvious that he has had little involvement in the prosecution of the action.

188 The other concern is with respect to the personal suitability of Mr. Stepp to act in the role of representative plaintiff. Mr. Stepp's affidavit was sworn on February 4, 2005. On April 11, 2005 Paul O'Donoghue, a claims investigator with the defendants, swore an affidavit which set out his contact with Mr. Stepp. Mr. O'Donoghue attests that Mr. Stepp came to the claims centre on August 14, 2004. Mr. O'Donoghue's observations were that Mr. Stepp was under the influence of alcohol when he attended the centre. Mr. O'Donoghue deposed that Mr. Stepp admitted that he had been drinking and that when he left the claims centre Mr. Stepp said "When I leave here I am going to go and buy more beer so I can get even more drunker".

189 Mr. O'Donoghue also deposed that Mr. Stepp told him that he had incurred out-of-pocket expenses and had lost wages. Mr. O'Donoghue attested that Mr. Stepp also told him he suffered a loss because he could not access his two Sprint race cars, because the cars were within the evacuation zone. Mr. O'Donaghue deposed that Mr. Stepp said that as a result of not accessing the race cars he was unable to enter a race held in Minnesota. Mr. Stepp asserted he lost $500 (U.S.) which he was guaranteed to receive by entering the race.

190 James Andronikos deposes that he spoke with one member of the Board of Directors of the Estevan Speedway and with the President of the Estevan Speedway, both of whom indicated that to their knowledge Mr. Stepp did not own any Sprint cars. Mr. Andronikos deposed that both of these men said they did not know of any race track which paid a car owner a fee for simply showing up. One of the two men did indicate that some tracks offer about $50 to assist in tow fees, if a competitor is travelling a long distance. Mr. Andronikos also deposed that around September 14, 2004 Mr. Stepp left him a phone message, asking when he was going to get a cheque for his wage claim. Mr. Andronikos spoke thereafter with Mr. Stepp, but Mr. Stepp did not mention the race car loss at that point.

191 Mr. Stepp did not file any affidavit in response to the affidavits of Mr. O'Donoghue or Mr. Andronikos to rebut the evidence which calls into question his honesty and personal suitability.

192 I recognize that the evidence of Mr. O'Donoghue and Mr. Andronikos respecting whether Mr. Stepp actually owns two Sprint race cars and whether his allegation of the loss of the $500 guarantee is based on hearsay. However, Mr. Stepp did not respond to any of it or ask to respond to it. On the evidence before me, I am not satisfied Glenn Stepp is a person who would vigorously and capably prosecute this claim. Nor am I satisfied he would be an appropriate person to assume such a "fiduciary" obligation.

193 I now turn to the final person proposed as a representative plaintiff. Eugene Babychuk was not named in the claim as a representative plaintiff. Again, it could be argued the claim could be amended. Eugene Babychuk deposed that he did reside in the evacuated area and was evacuated from his home. Mr. Babychuk's affidavit did have the draft Notice of Certification and draft Litigation Plan attached as exhibits.

194 However, there is a concern about whether Mr. Babychuk is a person who would capably prosecute the claim. In reviewing the file, it is noted that on March 11, 2005, plaintiffs' counsel indicated to the court that the plaintiffs did not intend to rely on the affidavit of Eugene Babychuk. Mr. Babychuk's affidavit was sworn March 23, 2005. On March 29, 2005 plaintiffs' counsel wrote to the court to seek leave to file the affidavit of Eugene Babychuk. At the certification hearing, counsel for the plaintiffs sought to rely on it.

195 Mr. Babychuk's affidavit, with the exception of his brief recount of his personal circumstances of evacuation, is identical to Mr. Stepp's. Mr. Babychuk does not set out any personal knowledge of any other persons with claims. Mr. Babychuk indicates that he does not have the financial ability to proceed with individual litigation. He does not address how he would manage the costs of class litigation nor does he set out if some arrangements have been made by the putative class to address such costs.

196 What is also lacking from the affidavit of Mr. Babychuk, as was lacking from the affidavit of Mr. Stepp, is any evidence that he has the knowledge, involvement or experience to properly instruct counsel or in any way move the action forward for the benefit of the class. Mr. Babychuk was the plaintiffs' third alternative choice as representative plaintiff.

197 While the affidavit of Mr. Babychuk attaches the proposed litigation plan and proposed notice, the notice proposed by Mr. Babychuk is not the same notice as proposed by Mr. Cunningham, the plaintiffs first choice as representative plaintiff. The affidavit of Mr. Babychuk was sworn five months prior to the affidavit of Mr. Cunningham. There is no evidence that Mr. Babychuk was involved in the preparation of the more recent proposed notices or the litigation plan. Mr. Babychuk does not address any addition to the litigation plan, as did Mr. Cunningham.

198 There is little information contained in the affidavit of Mr. Babychuk upon which a judgment can be made about his suitability. He expresses little knowledge about other class members or the action. There is nothing which indicates he was involved in the litigation plan or notice. It is difficult from the affidavit of Mr. Babychuk to see how he would be in a position to vigorously prosecute the claim or address the issue of costs. All of the evidence and circumstances coupled with the fact that Mr. Babychuk is only sought as the third alternative representative plaintiff leads me to the conclusion that Mr. Babychuk is not sufficiently involved and does not have sufficient knowledge or experience to prosecute this claim.

199 Mr. Justice Gerein in *Frey v. BCE Inc.*, 2006 SKQB 328, 282 Sask. R. 1 (Sask. Q.B.) at para. 86 said the following about proposed representative plaintiffs who appeared to be nothing more than spectators in the litigation:

> [86] Both individuals manifest such a dearth of knowledge, involvement and experience that it is apparent that they could not properly instruct counsel or in any way move the action forward to the benefit of the class. I recognize that class actions are largely lawyer driven. However, that does not mean that the representative plaintiff is merely a spectator. In this instance, the proposed representative plaintiffs are stick men and fragile ones at that. As such, they are not suitable.

200 I could say the same here. The evidence does not satisfy me that any of these proposed representative plaintiffs are directing the litigation. I cannot conclude that any of the proposed representative plaintiffs "would fairly and adequately represent the interests of the class". I conclude that the proposed representative plaintiffs are not appropriate representative plaintiffs for the proposed class action.

Conclusion

201 I have concluded that there is no genuine or authentic cause of action in the amended amended statement of claim. For this reason alone the action should not be certified as a class action.

202 I have also concluded that while the proposed class is objectively identified, the class is not rationally related to all the claims of loss. I have concluded that while there are some common issues, several of the proposed common issues

are not common across the proposed class. I have concluded that a class action would not be the preferable proceeding with respect to several of the common issues. Finally, I have held that none of the proposed representative plaintiffs are appropriate representative plaintiffs for a class action.

203 Accordingly, the application for certification is dismissed.

Application dismissed.