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DRUGS, CARS AND CIGARETTES – Some Brief Thoughts on Products Liability Class Actions

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by

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INTRODUCTION

Since class action legislation was enacted in Ontario and British Columbia in the 1990's, product liability claims have been a popular area for litigation. However, despite their popularity and the notion that they are particularly suited to class proceedings, not all product liability claims are certified.

This paper will consider product liability claims in three classic areas: drugs or medical devices, cars and cigarettes. Of the three, drugs and medical devices have the best track record for certification. The rebirth of "waiver of tort" in *Serhan v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (S.C.J.), aff'd (2006), 85 O.R. (3d) 665 (Div. Ct.), leave to appeal refused [2006] S.C.C.A. 494 ("*Serhan*") and the cases following it (several of which will be discussed below) has also given plaintiffs' counsel another useful weapon against defendants' arguments that causation issues make product liability cases unsuitable for certification. Proposed class actions against automobile manufacturers have fared less well, and actions against cigarette manufacturers (with one exception) have been, for the most part, very expensive failures for plaintiffs and their counsel.

Can the elements – identification of products, thoughtful selection of causes of action, a defect and resulting harm that can be proved on a class-wide basis, a readily identifiable class ("all persons who ingested," "all persons who were implanted with," etc.) and common issues focussed on the conduct of defendants – that contribute to success in the drug and medical device actions be imported into other product liability areas? Or are some products liability complaints simply not amenable to class action litigation?

DRUGS AND MEDICAL DEVICES – A SUCCESSFUL FORMULA

Products liability claims were among the first to be filed and certified when class actions legislation was enacted in Ontario and British Columbian in the 1990's. Indeed, the first three

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cases to be certified in British Columbia – and confirmed on appeal – were product liability claims involving breast implants, radiant heating panels and toilet tanks.[1]

Harrington v. Dow was an omnibus action against a number of manufacturers of breast implants.[2] The certification judge certified single common issue: are silicone breast implants reasonably fit for their intended purpose.

In dismissing the defendants' appeal, the Court of Appeal also commented generally on the steps in any products liability case. The first step is an inquiry into "general causation," i.e., whether the product is capable – in its ordinary use – of causing the harm alleged. The second step is assessment of the state of the manufacturer's knowledge of the dangerousness of the product, i.e., its capacity to cause the harm. The third step is an assessment of the reasonableness of any warning, and the final step is determination of individual causation and damages. The cases that are certified tend to follow this basic outline.

The courts made it clear that the existence of individual causation and damages issues would not prevent certification.[3] Provided there was some evidence to support the conclusions that the alleged defect and harm could be proved on a class-wide basis, certification was the probable result.

Examples

Subsequently, product liability cases certified in British Columbia and Ontario developed a pattern for the class definition and common issues, and relied on a close connection between the alleged defect and the alleged harm:

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[1] *Harrington v. Dow Corning Corp.* (1996), 22 B.C.L.R. (3d) 97 (S.C.), aff'd (2000), 82 B.C.L.R. (3d) 1 (C.A.) ("*Harrington v. Dow*"); *Campbell v. Flexwatt Corp.* (1996), 25 B.C.L.R. (3d) 329 (S.C.), aff'd (1998), 44 B.C.L.R. (3d) 343 (C.A.); *Chace v. Crane Canada Inc.* (1997), 26 B.C.L.R. (3d) 339 (S.C.), aff'd (1998), 44 B.C.L.R. (3d) 264 (C.A.). Certification was also granted in *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 (S.C.), rev'd in part (1998), 48 B.C.L.R. (3d) 90 (C.A.), involving contaminated blood products (spoliation claim struck on appeal). *Bendall v. McGhan Medical Corp.* (1993), 106 D.L.R. (4th) 339 (Ont. G.D.), leave to appeal refused [1993] O.J. No. 4210, also involving breast implants, was one of the first cases certified in Ontario. *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 127 D.L.R. (4th) 552 (Ont. G.D.), leave to appeal refused 129 D.L.R. (4th) 110, leave to appeal refused (1996), 7 C.P.C. (4th) 206 (Ont. C.A.), a case involving pacemaker leads, was also certified.

[2] While this may have set up a "David v. Goliath" – or "Goliaths" scenario, the strategy of suing in a single action a whole industry was problematic for plaintiffs' counsel, and subsequently cases – *Wilson v. Servier* and *Serhan*, for example – have tended to focus on a single defendant (or a group of related defendants).

[3] For example, the court granted certification in *Endean*, despite a predominance of individual issues. B.C. judges readily accepted that litigating claims in a class action offered advantages in addition to judicial economy, access to justice and behaviour modification: see *Bouchanskaia v. Bayer* (below), para. 150, *Nanaimo Immigrant Settlement Society v. British Columbia* (2001), 84 B.C.L.R. (3d) 208 (C.A.), paras. 20-21; *Scott v. TD Waterhouse Investor Services* (2001), 94 B.C.L.R. (3d) 320 (S.C.), paras. 115-116, 139-14. Ontario is now also on board: see *Cassano v. Toronto-Dominion Bank* (2007), 87 O.R. (3d) 401 (C.A.), paras. 62-64.

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(a) *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.), a case involving so-called "diet drugs" (which had been withdrawn from the market), alleged to cause serious personal injuries or death:

Class Description (para. 54): All persons resident in Canada (excluding Quebec) who were prescribed and ingested the diet drugs marketed under the brand name Ponderal (generic name: fenfluramine) and/or Redux (generic name: dexfenfluramine) . . ..

Common issues (para. 107):

(1) whether Ponderal and/or Redux can cause primary pulmonary hypertension (PPH), valvular heart disease or valvular regurgitation;

(2) whether Ponderal and/or Redux are defective or unfit for the purpose for which they were intended as designed, developed, fabricated, manufactured, sold, imported, distributed, marketed, or otherwise placed into the stream of commerce in Canada by one or both of the defendants;

(3) whether the defendants knowingly, recklessly, or negligently breached a duty to warn or materially misrepresented any of the risks of harm from Ponderal or Redux;

(4) whether Biofarma is responsible in law for the acts of Servier in respect of the sale and marketing of Ponderal and Redux in Canada;

(5) whether the defendants negligently misrepresented the safety of the drugs after having received information as to the potential of the drugs to cause serious health effects;

(6) whether class members are entitled to special damages for medical costs incurred in the screening, diagnosis and treatment of diseases related to Ponderal and Redux;

(7) whether class members are entitled to equitable relief whereby they are reimbursed for the purchase price of Ponderal or Redux; and

(8) whether the class members are entitled to aggravated or punitive damages.

(b) *Hoy v. Medtronic, Inc.* (2002), 94 B.C.L.R. (3d) 169 (S.C.), aff'd (2003), 14 B.C.L.R. (4th) 32 (C.A.), involving allegedly defective pacemakers:

Class description (para. 2): All persons resident in Canada implanted with Medtronic pacemaker Pacing Lead Models 4004/4004M and 4012 (the "leads"), who have not executed releases in favour of one or both of the Defendants in relation to the functioning of the Leads.

Common issues (para. 46)[4]:

(1) Did the defendants owe a duty of care to persons in whom the leads were implanted?

(2) Did the defendants breach the standard of care in designing, manufacturing and distributing the leads, and if so, when did the breach begin?

(3) In considering (b), the following sub-issues are:

(i) Was the lead insulation unreasonably prone to degeneration and failure due to: (A) Metal Ion Oxidation ("MIO"); (B) Environmental Stress Cracking ("ESC"); and (C) negligent processing of polyurethane during the manufacture of the leads?

(ii) Did the defendants fail to: (A) ensure that the leads were free of defects; (B) perform sufficient pre-market tests on the leads; (C) design and manufacture leads that were adequate to protect against failure and degeneration during ordinary use in employing P80A as insulation; (D) produce a product capable of withstanding the stresses of ordinary and foreseeable uses; (E) employ available design and manufacture techniques that would have reduced the likelihood of failure of the leads; (F) ensure that the leads did not deviate in a material way from their design and release specifications; (G) recall the leads when they knew or ought to have known of the risk of injury prior to the implantation of leads into class members; (H) obtain all required approvals; (I) provide Health Canada (and its predecessors) and the FDA with all relevant information regarding any risks posed by the leads; and (J) provide adequate warnings as to any risks of the leads to physicians, surgeons and all other intermediaries as well as class members of any potential risks or hazards associated with the use of the leads?

(4) If the defendants breached the duty of care owed to the plaintiff, is the plaintiff entitled to an award of punitive damages having regard to the nature of the established breaches?

(c) *Olsen v. Behr Process Corporation* (2003), 17 B.C.L.R. (4th) 315 (S.C.): exterior wood coatings alleged to cause mildew when applied.

Class description (para. 3): all persons and entities (a) who purchased and applied or caused to be applied, on or after January 1, 1991, the Defendants' products [identified] (the "Products") to a natural wood exterior surface within British Columbia; or (b) who

[4] The defendant was able to exploit very effectively the detail in these common issues by forcing the plaintiffs to provide particulars: see *Hoy v. Medtronic, Inc.* (2002), 21 C.P.C. (5th) 86 (B.C.S.C.), 2002 BCSC 1648, *Hoy v. Medtronic, Inc.*, 2003 BCSC 666, and *Hoy v. Medtronic, Inc.*, 2004 BCSC 440.

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have a legal or beneficial interest in a natural wood exterior surface within British Columbia, to which the Products were applied on or after January 1, 1991.

Common issues (para. 4)[5]:

(1) Negligence Issues

(a) Did the Defendants owe a duty of care to the Plaintiffs and the Class Members to ensure that the Products were not defective and would not result in damage or injury to the exterior wood surfaces to which they were applied?

(b) Did the Defendants breach the standard of care in designing, manufacturing and testing the Products, and if so, when did the breaches begin? In relation to this issue, the following sub-issues will be considered: (i) Did the Products contain ingredients that were chemically incompatible or unstable, such as to promote mildew growth and discolouration and degradation of the Products and the wood surfaces to which they were applied? (ii) Did the Products contain insufficient concentrations of mildewcide or an improper type of mildewcide so as to cause mildew growth and discolouration and degradation of the Products and the wood surfaces to which they were applied? (iii) Did the Defendants ignore warnings provided by their mildewcide suppliers to the effect that the suppliers' mildewcide should not be used with the Products? (iv) Did the Products contain ingredients that would not dry completely, leaving a finish that would attract dirt and debris and promote mildew growth and discolouration? and (v) Did the Defendants fail to properly test the performance of the Products either before or after distribution, or, alternatively, did they ignore, conceal, destroy or lose the results of such tests?

(c) Did the Defendants owe a duty of care to the Plaintiffs and the Class Members to warn them that the Products could cause damage to exterior wood surfaces by promoting mildew growth, discolouration and degradation?

(d) Did the Defendants breach the standard of care in failing to adequately warn the Plaintiffs and the Class Members that the Products could cause damage to exterior wood surfaces, and if so, when did the breaches begin?

(d) *Bouchanskaia v. Bayer Inc.*, [2003] B.C.J. No. 1969: the drug "Baycol" was alleged to cause various dangerous side effects, including rhabdomyolysis, which could be fatal if untreated. It had been withdrawn from the market.

Class description (para. 5): All persons resident in British Columbia who ingested Baycol.

[5] Only the negligence issues were certified. See para. 37 of the judgment.

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Common issues (para. 6):

(1) Did Bayer breach the duty of care it owed to persons who ingested Baycol in its role with Baycol, including in designing, manufacturing and/or distributing Baycol and, if so, when did the breach begin?

(2) Did Bayer's marketing and sale of Baycol constitute deceptive or unconscionable acts or practices pursuant to the B.C. *Trade Practice Act*?

(3) Did Bayer's marketing and sale of Baycol breach s. 52 of the *Competition Act*?

(e) *Andersen v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136 (S.C.J.), leave to appeal refused [2005] O.J. No. 269: complaints about silzone-coated medical devices (heart valves).

Class Description (para. 16): Canadian residents -- other than residents of British Columbia or Quebec -- who were implanted with one or more mechanical heart valves, or annuloplasty rings, coated with Silzone that were designed, manufactured, marketed, distributed or sold by the defendants.

Common issues (para. 63):

(1) Did the defendants breach a duty of care owed to class members by reason of the design, pre-market testing, regulatory compliance, manufacture, sale, marketing, distribution and recall of Silzone-coated mechanical heart valves and annuloplasty rings implanted in such members?

(2) What effect, if any, does such Silzone coating have on tissue healing?

(3) Does a Silzone coating on heart valves, or annuloplasty rings, materially increase the risk of various medical complications including, but not limited to, paravalvular leakage, thrombosis, thromboembolism, stroke, heart attacks, endocarditis or death?

(4) Do Silzone-implanted patients need additional or different medical monitoring than that for conventional mechanical heart valve patients?

(5) Should the defendants be required to implement a medical monitoring regime and, if so, what should that regime comprise and how should it be established?

(6) Is the burden of proof of causation or negligence affected by spoliation of evidence by the defendants?

(7) Does the defendants' conduct merit an award of punitive damages, and if so, in what amount?

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(f) *Boulanger v. Johnson & Johnson*, [2007] O.J. No. 179, leave to appeal refused [2007] O.J. No. 1991: the drug Prepulsid (which had been withdrawn from the market) was alleged to cause dangerous side effects:

Class description (para. 56): all persons in Canada other than in Quebec who ingested Prepulsid as well as their estates and certain family members;

Common issues (para. 56):

(1) Whether Prepulsid can cause or materially contribute to cardiac arrhythmia, including ventricular tachycardia, cardiac arrest, prolonged QT, torsades de pointes, ventricular fibrillation, sudden death and other heart disease;

(2) Whether the Corporate Defendants breached a duty of care owed to class members by reason of the design, manufacture, marketing, sale and such other acts taken in placing and maintaining Prepulsid into the stream of Canadian commerce, and if so, who, when and how;

(3) Whether Prepulsid was fit for its intended purpose;

(4) Whether Johnson & Johnson Corporation is responsible in law for the acts and omissions of Janssen-Ortho Inc. in respect of the marketing, distribution, and placing and maintaining Prepulsid into the stream of Canadian commerce;

(5) Whether the Corporate Defendants, or any of them, are liable for the subrogated health care costs of Class members incurred in the screening, diagnosis and treatment of conditions related to Prepulsid, and if so, whether these costs may be assessed on a global basis; and

(6) Whether the conduct of anyone or more of the Corporate Defendants justifies an award of punitive damages, and if so, against whom, in what amount and to whom.

***Serhan* and Waiver of Tort**

Serhan, which involved complaints about allegedly malfunctioning devices (a "Sure Step" meter or strip) used by diabetics to monitor blood glucose levels, presented a problem for plaintiffs' counsel: proof of damage was necessary to establish a complete cause of action in negligence, and arguably the plaintiff and class members would be unable to prove actionable damage. Although he accepted that the negligence issues were common issues, Cullity J. refused to certify them.[6] However, the plaintiff had pleaded constructive trust as a separate cause of action. Cullity J. was able to identify a common issue based on "waiver of tort",[7] and proceeded

[6] See Cullity J., paras. 55 – 61.

[7] Cullity J., paras. 64 – 66.

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to certify the case. His order was upheld by the Divisional Court (Chapnik J. dissenting), with the following results:

(a) the certified class description was: all persons in Canada (except British Columbia and Quebec) who used a Sure Step meter, or a Strip, on, or after, February 1, 1996

(b) the certified common issues were (para. 35):

(1) Are the defendants, or any of them, constructive trustees for all, or any, class members of all, or any part of, the proceeds of the sales of the SureStep Meter and Strips and any other income made by them in connection with the SureStep Meter, Strips and associated paraphernalia, including the lancets and controlled solutions? If so, in what amount and for whom are such proceeds held?

(2) Are the defendants, or any of them, liable to account to all, or any, of the class members on a restitutionary basis for all, or any part of, the proceeds of the sales of the Sure Step Meter and Strips and any other income made by them in connection with the Sure Step Meter, Strips and associated paraphernalia, including the lancets and controlled solutions? If so, in what amount and for whose benefit is such accounting to be made?

(3) Should one or more of the defendants pay punitive damages? If so, in what amount and to whom?

(4) Who should pay the cost of administering and distributing amounts to which class members are entitled and how, and when, should such cost the [sic; be] determined?

Heward v. Eli Lilly & Company, [2007] O.J. No. 404 (S.C.J.), leave to appeal granted in part [2007] O.J. No. 2709, concerned the drug Zyprexa, alleged to cause an increased risk of diabetes along with a variety of other problems. Again, plaintiffs' counsel faced several problems: the proposed class included individuals who had not yet suffered any actionable damage, and the drug was still being prescribed. In addition to a negligence claim, the plaintiffs also advanced a claim based on unjust enrichment or waiver of tort, and sought disgorgement of profits. However, unlike *Serhan*, the only "tort" pleaded was negligence.

Cullity J. granted certification based on the following class description and common issues:

(a) class description (para. 66): all persons resident in Canada (excluding British Columbia and Quebec) who were prescribed and ingested the drug Zyprexa (generic name: olanzapine), which was manufactured, marketed, and/or sold or otherwise placed into the stream of commerce in Canada by Eli Lilly & Company and/or Eli Lilly Canada Inc.; and [derivative claims];

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(b) common issues:[8]

(1) Can Zyprexa cause diabetes and/or other metabolic disturbances as well as secondary injuries flowing therefrom?

(2) (2) Is Zyprexa defective or unfit for the purpose for which it was intended as designed, developed, fabricated, manufactured, sold, imported, distributed, marketed or otherwise placed into the stream of commerce in Canada by one or both of the defendants?

(3) (3) Did the defendants knowingly, recklessly or negligently breach a duty to warn or materially misrepresent any of the risks of harm from Zyprexa?

(4) (4) Are class members entitled to special damages for medical costs incurred in the screening, diagnosis and treatment of diseases related to Zyprexa?

(5) Should the defendants be required to implement a medical monitoring regime and, if so, what should that regime comprise and how should it be established?

(7) Should the defendants pay exemplary or punitive damages?

(9) Are the defendants liable to account, by waiver of tort, to any of the class members on a restitutionary basis for any part of the proceeds of the sales of Zyprexa? If so, in what amount and for whose benefit is such accounting to be made?

Notably, Cullity J. did not certify an issue concerning the amount of punitive damages.[9]

Lederman J. granted leave to appeal part of Cullity J.'s order in *Heward*, concerning the certification of issue (9), the "waiver of tort" issue, specifically the part dealing with the amount to be disgorged or subject to a constructive trust.

Lederman J. did not doubt the correctness of Cullity J.'s conclusion that it was not plain and obvious the waiver of tort claim would fail, and rejected the defendant's argument that it must fail because the wrongful conduct was grounded in negligence.[10] However, he accepted the defendants' arguments that there was no evidence to suggest that class members would not have taken Zyprexa if warnings about the risks of taking the drug had been different, and that each

[8] Cullity J. rejected common issue (6), Can the past and future damages of the provincial health insurers be determined on an aggregate basis?, on the grounds that the requirements in s. 24 of the Ontario *Class Proceedings Act* could not be satisfied. He also rejected common issue (8), Are the defendants constructive trustees for all or any class members of all or any part of the proceeds of the sales of Zyprexa and if so, in what amount, and for whom are such proceeds held?, on the grounds that the constructive trust claim had not been properly pleaded, and that a reference to a constructive trust as an alternative remedy could be included in issue (9), rendering issue (8) redundant.

[9] See *Heward*, paras. 97 – 98.

[10] *Heward Leave*, paras. 8 – 11.

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individual member of the class would have to be examined to determine whether he/she would have stopped taking the drug if different information had been available.[11] This, essentially, was the argument the court had accepted in *Harrington v. Dow* in refusing to certify a "duty to warn" common issue: the issue was subjective and personal to each individual class member in determining the manufacturer's liability.[12].

Lederman J. explained that, while *Serhan* did not require proof of loss for entitlement to a remedy in waiver of tort, there must still be proof of a "wrongful gain," and a "wrongful gain" requires proof of wrongful conduct that caused the gain. Consequently, for the amount subject to disgorgement and constructive trust to be a common issue, the pleadings and evidence on certification needed to demonstrate a way to prove on a class-wide basis that the alleged wrongful conduct (i.e., the failure to warn) caused the gain (i.e.., the proceeds from Zyprexa sales).[13]

"Waiver of tort" was again before the court in *Peter v. Medtronic, Inc.* [2007] O.J. No. 4828 (S.C.J.) ("*Peter v. Medtronic*"), a claim involving allegedly defective defibrillators. Hoy J. granted certification based on the following class description and common issues (subject to amendment of the conspiracy claim, which was struck out):

(a) class description (paras. 71-72): "Class" or "Class Members" means all persons implanted in Canada with one of the listed models of Defibrillators, containing a Chi 4420L battery manufactured prior to December 31, 2003. (The court left open that some models could be deleted later.) In addition, there was a "Family Class.")

(b) common issues (paras. 87, 90, 99, 105, 106):

(1) Did the Defendants, or either of them, owe a duty of care to the Class in respect of the design, development, testing, manufacturing, licensing, assembling, distribution and sale of the Defibrillators?

(2) If so, did the Defendants, or either of them, breach such duty? If so, what was the nature of the breach?

(3) Did the Defendants, or either of them, owe a duty to the Class to warn of the potential battery shorting defect associated with the Defibrillators, and if so, when did such duty arise?

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[11] *Heward Leave*, paras. 22, 24 – 26, 32 – 33.

[12] *Harrington v. Dow*, para. 8

[13] Compare this with the approach taken by the B.C. Court of Appeal in allowing the plaintiff's appeal and granting certification in *Collette v. Great Pacific Management Co.* (2004), 26 B.C.L.R. (4th) 252 (C.A.). Essentially the inquiry is moved back to the defendants and whether they had done sufficient "due diligence" prior to making the product available to class members, rather than requiring individual inquiries to be made of the class members about what each would have done had a warning been given.

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(4) If so, did the Defendants, or either of them, fail to warn the Class of the existence of the potential battery shorting defect associated with the Defibrillators?

(5) Did Medtronic, Inc. and Medtronic Canada Inc. conspire one with the other to conceal information relating to the potential battery shorting defect associated with the Defibrillators in violation of the FDA and the Regulations? If so, what was the nature and purpose of the conspiracy? [To be revised: see para. 90.]

(6) Can all or part of the Class elect to have damages determined through an accounting and disgorgement of the proceeds of the sale of the Defibrillators implanted in Class Members? If part, but not all, of the Class can so elect, which part or parts of the Class can so elect? If so, in what amount and for whose benefit is such accounting to be made? [See para. 99]

(7) Should one or both of the Defendants pay punitive damages to the Class?

(8) Should one or both of the Defendants pay the costs of administering and distributing any recovery? If so, in what amount?

(9) Should one or both of the Defendants be ordered to pay prejudgment interest? If so, who should pay, and at what annual rate? Should the payment be simple or compound interest? How is the prejudgment interest to be calculated?

As Cullity J. had done in *Heward*, Hoy J. did not certify a common issue concerning the amount of punitive damages.

In April, 2008, Mr. Justice Cullity granted certification of another action involving defibrillators, in *LeFrancois v. Guidant Corporation and others*, 2008 CanLII 15770 (Ont. S.C.J.). Although plaintiffs' counsel relied heavily on Hoy J.'s ruling in *Peter v. Medtronic*, Cullity J. said (para. 4) that defendants' counsel were "correct in their submission that this case must be determined on the basis of the record before me and the submissions of counsel."

The plaintiffs alleged negligence and conspiracy, and "reserved the right" to "waive" these torts and have damages assessed on the basis of the defendants' revenues or net income. The class description and common issues certified were:

(a) **class description** (para. 63): all persons who were implanted in Canada with one or more of the specified 13 models of the nine defibrillators.

(b) **common issues** (para. 70):

1. Did any of the defendants owe a duty of care to the class members? If so, what was the standard of care? Did any of the defendants breach the standard of care? If so, who, when and why?

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2. Did the defendants, or any of their officers, directors, employees, servants, conspire? If so, who conspired with whom, when, where, why and for what purpose?

3. Can all or part of the class elect to "waive the tort" and require the defendants to account for the gross revenue, or alternatively, the net income from the sale of the Defibrillators in Canada? If part but not all of the class can elect, which part or parts of the class can elect? For whose benefit is the accounting to be made? Should the subrogated claims of the provincial health insurers be included in the accounting? Are the defendants constructive trustees over the gross revenue or the net income? What amount is held in a constructive trust and by whom?

4. Can the damages of the class members be determined, in whole or in part, on an aggregate basis? If so, who should pay what amount, to whom and why?

5. Are the plaintiffs entitled to an award of punitive damages against one or more of the defendants? If so, against whom and in what amount? Should punitive damages be assessed in the aggregate? If so, in what amount and how should punitive damages be distributed?

6. Should the defendants, or any of them, pay prejudgment and post-judgment interest, at what annual interest rate, and should the interest be compound interest?

7. Should the defendants, or any of them, pay the costs of administering and distributing any monetary judgment and/or the cost of determining eligibility and/or the individual issues? If so, who should pay what costs, why, in what amount and to what extent.

Factors leading to success

The drug and medical device cases illustrate the factors that – while not providing a guarantee – lead to a high probability of certification. The selection of the product, identification of the defect(s) and connection of the defect(s) with the alleged harm are obviously critical. If the "defect" appears, based on an appropriate body of evidence, to be capable of resulting in class-wide harm of a particular type, that improves the chances of certification. Selection of the defendant or defendants is important. Naming multiple, unrelated defendants can decrease the chances of certification (in addition to multiplying opposing counsel). On the other hand, naming multiple related defendants has allowed plaintiffs' counsel to plead conspiracy and other claims (including unjust enrichment and constructive trust), in addition to classic negligence claims. Appropriate selection of the product, identification of the defect(s) and harm, and thoughtful pleading of the causes of action all facilitate drafting the class description (e.g., "all persons who ingested", "all persons who were implanted with") and common issues.

CARS: MIXED SUCCESS

Product liability actions involving automobiles have been more challenging for plaintiffs' counsel. Identification of defects, connecting those defects with an appropriate type of harm, capable of litigation in class proceedings, and assembling an appropriate body of admissible evidence to show there is an identifiable class sharing common issues have proved difficult.

In 2003, Gerow J. granted certification of a class action brought against Ford Motor Company in a case involving the ignition system in Ford, Lincoln and Mercury models from 1983 – 1995 that were equipped with distributor mounted thick film ignition ("TFI") modules (the "class vehicles"): *Reid v. Ford Motor Company*, 2003 BCSC 1632. The plaintiff sought the cost to repair the vehicles, on the grounds that the TFI modules caused the cars to stall without warning and were therefore dangerously defective. In short, the theory advanced by the plaintiffs on certification was that the alleged defects caused a particular kind of class-wide harm: stalling, and sometimes stalling in very dangerous situations.

Gerow J. certified a class consisting of: all persons resident in British Columbia who (a) currently own or lease a class vehicle; or (b) owned or leased a class vehicle and paid or were charged for the cost of replacing a TFI module in such vehicle; or (c) purchased or leased a class vehicle and paid or were charged for the cost of replacing a TFI module when the vehicle was new.[14] The common issues certified included issues typically found in other products liability actions, for example: whether the defendants owed a duty of care, whether the defendants breach the standard of care in failing to recall the class vehicles, and whether the defendants breached a duty to warn, whether the defendants were liable for punitive damages, in addition to other issues.[15]

After *Serhan* was certified, class counsel in *Reid* applied to amend the statement of claim and the certification order to include a "waiver of tort" common issue. The application was dismissed: *Reid v. Ford Motor Company*, 2006 BCSC 712. Gerow J. concluded that the plaintiff had failed to plead a complete claim for unjust enrichment,[16] and the claim for waiver of tort could not be sustained on the facts pleaded.

However, other than *Reid*, automobile manufacturers have enjoyed success resisting certification, at least to date.

General Motors was the successful party in one of the very rare appeals in British Columbia where the Court of Appeal reversed a certification order, and dismissed the application: *Ernewein v. General Motors of Canada Ltd.* (2005), 46 B.C.L.R. (4th) 234 (C.A.),

[14] *Reid*, para. 105.

[15] *Reid*, paras. 46, 59, 60, 68, 71.

[16] The proposed amended statement of claim alleged enrichment accruing to the defendant resulting from its negligence and failure to warn in relation to the TFI modules, but failed to allege any deprivation suffered by the plaintiff and class members. *Soulos v. Korkontzilas* (1997), 146 D.L.R. (4th) 214 (S.C.C.) was not cited.

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2006 BCCA 540.[17] The plaintiff alleged that, between 1973 and 1991, certain GM pick-up trucks were designed with their fuel tanks outside the "rails" of the vehicles, and thereby created a risk of harm to consumers in the event of a side-impact collision. No actual physical injury or damage was alleged. However the plaintiff complained that the vehicles were less valuable as a result of the (defective) design, a claim for pure economic loss.

The main issue on the defendants' appeal was whether there was a sufficient evidentiary basis to support the certification order, in particular the conclusion that there were common issues. The Court of Appeal held there were none, based on the evidentiary record, and the lack of any admissible evidence on the point.[18]

Newbury J.A. allowed General Motors' appeal "notwithstanding the fact that product liability claims are often cited as an example of the type of action particularly suited to class action proceedings."[19] She reminded parties and their counsel that in each instance, whether the certification criteria had been satisfied "must be determined 'contextually' – i.e., not on the basis of a blanket assumption regarding product liability cases but in light of all of the evidence concerning the specific case before the court."

In *Benning v. Volkswagen Canada Inc. and others*, 2006 BCSC 1292, Volkswagen was successful in defeating certification of an action complaining about alleged defects in the locking system of Volkswagen Jettas and other Volkswagen and Audi models with the equivalent locking system design. The plaintiff complained that the locking system failed to adequately discourage "improper" entry when the car was parked unattended, and testified that his car had been broken into on two occasions. The proposed class was: all persons in British Columbia who own or lease a Volkswagen Jetta sedan (1999-2005), Volkswagen Jetta wagon (1999-2006) which was purchased or leased from Volkswagen dealers in British Columbia.[20]

The cause of action pleaded was breach of the implied warranties of quality and fitness under s. 18 of the *Sale of Goods Act* – an unusual feature of the case – although the defendants conceded that the pleadings disclosed a cause of action.[21] Only two common issues were proposed: (1) is the locking system defective? and (2) Does the sale of the locking system violate the provisions of the *Sale of Goods Act*?[22]

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[17] Under the B.C. *Class Proceedings Act*, s. 36, a defendant (as well as the plaintiff) has an appeal as of right from the certification order.

[18] See *Ernewein*, paragraphs 31 and following. In her analysis, Newbury J.A. also criticized the drafting of the common issues: see her comments at paras. 22-23.

[19] *Ernewein*, para. 33.

[20] *Benning*, para. 3.

[21] *Benning*, paras. 35 – 41. Typically, a claimant will have no contractual relationship with the manufacturer in a product liability case and will be unable to rely on the provisions of the *Sale of Goods Act*, although these are sometimes pleaded in addition to negligence claims. However, on the facts in *Benning*, the plaintiff may have had a contractual relationship against other defendants, allowing the claim to be based on the implied warranties under the *Sale of Goods Act*.

[22] *Benning*, para. 50.

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Gropper J. concluded that the plaintiff had failed to satisfy both the "identifiable class" and common issues requirements of the *Class Proceedings Act*. In her view, the class description was too broad insofar as it included proposed class members who had suffered no loss, not had their vehicles broken into at all, or not had a break-in of the type Mr. Benning complained of. On the common issues, she agreed with the defendants that there was no evidence from which she could conclude that the nature of the attack on the plaintiff's vehicle bore any similarity to that of any other class member.

A fundamental problem with the plaintiff's case in *Benning* was the inability of proving on a class-wide basis that the locking system was "defective" and resulted in "harm" in the manner the plaintiff alleged. It was impossible for plaintiff's counsel to argue that the locking system "caused" break-ins – which was the plaintiff's real complaint. This inevitably led to problems in describing an identifiable class (which the plaintiff was never able to do), and in framing appropriate common issues.

Ford (and Magna) defeated certification in *Poulin v. Ford Motor Company of Canada* (2007), 35 C.P.C. (6th) 264, [2006] O.J. No. 4625 (S.C.J.) ("*Poulin*"), where the claims arose out of allegedly defective springs in the door latch mechanisms of certain vehicles manufactured by Ford. The plaintiff alleged that the springs failed to meet the minimum standards prescribed by the regulators both in Canada and the United States in terms of withstanding forces that would cause the door latch mechanism to remain in place and the door in question to remain closed in the event of rollover accidents or a side impact collision with other vehicles, and claimed further that this failure of the door latch mechanism was a latent defect and rendered the affected vehicles inherently dangerous to the occupants or passengers in those vehicles.[23] The plaintiff alleged negligence in the production, design and manufacture of the spring and door latch mechanisms and breach of the implied warranty of fitness under the *Sale of Goods Act*.

MacKenzie J. found that the plaintiff had failed to plead any proper claim under the *Sale of Goods Act*, primarily because neither the plaintiff nor any of the proposed class members had purchased anything from any of the defendants, and no proper claim had been pleaded under the *Business Practices Act*. That left only a claim in negligence, and MacKenzie J. found the pleadings disclosed a reasonable claim.[24] The court also accepted the proposed class definition: all individuals or corporations who purchased or leased any of the Affected Vehicles in Canada from November 1995 to April 2000, estimated to number about 317,000. However, the court rejected the proposed common issues, and, in addition, concluded that a class proceeding was not preferable and the plaintiff had failed to produce an adequate litigation plan.

The proposed common issues are found at para. 58 of MacKenzie J.'s judgment:

(1) whether the defendants owe a duty of care to the class members; and whether they breached that duty of care;

[23] *Poulin*, para. 3.

[24] *Poulin*, para. 40.

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(2) whether the springs in the outside door handles utilized in the Affected Vehicles are defective and unreasonably safe;

(3) whether the Crash Pulse Test can be utilized for compliance for the Affected Vehicles manufactured prior to September 1, 1997;

(4) whether the Crash Pulse Test method is equivalent to the SAE J839 calculation for the purpose of the CMBSS 206;

(5) whether a violation of the requirement to meet 30 G's [sic] renders the Affected Vehicles unsafe;

(6) whether the outside door handle springs were designed or manufactured to keep doors closed on impact;

(7) whether the defendants failed to give adequate warnings regarding the defects and limitations of the Affected Vehicles;

(8) whether the Affected Vehicles breached their collateral warranties as to fitness and safety and are fit for their ordinary and intended use;

(9) whether the plaintiffs and the members of the class are entitled to compensatory damages and, if so, the nature and amount of such damages;

(10) whether the members of the class are entitled to punitive and exemplary damages and, if so, the quantum of such damages.

On their face, these proposed issues look familiar and unremarkable. However, none were accepted.[25] Issue (1) was conceded by the defendants, and the court concluded resolution of that issue would not advance the litigation sufficiently. The plaintiffs had failed to establish a sufficient evidentiary basis that Issue (2) satisfied the definition of "common issue," given the differences in the door latch mechanisms of the affected vehicles. Issue (6) had similar problems. Although cases had been certified including a common issue concerning a duty to warn, others had not, and MacKenzie J. concluded Issue (7) was an individual issue. Once the *Sale of Goods Act* claims had been struck, Issue (8) could no longer remain. Causation and damages had not been pleaded in the statement of claim, and there was therefore no foundation in the pleadings for issue (9), and there was nothing in the evidentiary record to support a conclusion that issue (9) could ever be a determined on a class-wide basis. Issue (10) concerning punitive damages could not stand alone.

Apart from *Reid*, these "car" cases appear to suffer from a common defect: the failure or inability to identify a product defect or defects that, based on a sufficient evidentiary record, caused or was likely to cause a type of class-wide harm.

[25] *Poulin*, para. 67.

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CIGARETTES: MOSTLY DISAPPOINTMENT

There have been two attempts in the common law provinces to certify conventional products liability cases concerning cigarettes, *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.) and *Ragoonanan v. Imperial Tobacco Canada Limited* (2005), 78 O.R. (3d) 98 (S.C.J.). Both have failed.

On the other hand, recasting the case as a consumer complaint about misleading advertising, and abandoning the idea of recovering individual damages for personal injuries, has resulted in success, at least at the certification stage: *Knight v. Imperial Tobacco Canada Limited* (2005), 250 D.L.R. (4th) 347 (B.C.S.C.), varied (2006), 54 B.C.L.R. (4th) 204 (C.A.) 2006 BCCA 235.

In *Caputo*, the plaintiffs sought to certify a case claiming damages for personal injuries caused by cigarettes, "inherently defective and dangerous products," against three cigarette manufacturers. The case involved nine causes of action, including negligence, strict liability, products liability, breach of a duty to inform, deceit, negligent misrepresentation, unfair business practices, breach of implied warranty and conspiracy. The scope of the claims and the proposed class were enormous. These factors contributed in large measure to its failure, although Winkler J. (as he then was) reminded litigants (and their counsel) that, regardless of complexity, if the certification requirements were satisfied, an action must be certified.[26]

Despite multiple attempts, including during oral argument, plaintiffs' counsel were never able to arrive at an acceptable class definition, one where there was a rational connection between the class as defined and the common issues, and that was neither too broad nor too narrow.[27] The class size was estimated in the millions.

Plaintiffs' counsel were apparently reluctant to restrict the causes of action in order to make the action more amenable to certification, an approach that the Supreme Court of Canada acknowledged in *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.) was quite acceptable. Rather, they proposed what the court described as "arbitrary exclusions" to the class definition, and ultimately tried to convince Winkler J. to amend the class definition in any way he thought was necessary to render the action certifiable. Not surprisingly, Justice Winkler declined.[28]

In the end, Justice Winkler concluded (para. 45):

> [T]he present action is an amalgam of potential class proceedings that make it impossible to describe a single class sharing substantial "common issues", the resolution of which will significantly advance the claim of each class member .... Moreover, this is not a case where the creation of subclasses will

[26] *Caputo*, para. 13.

[27] *Caputo*, para. 29 and following

[28] *Caputo*, paras. 39-41.

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> address the primary class definition deficiency. Subclasses are properly certified where there are both common issues for the class members as a whole and other issues that are common to some but not all of the class members. This is not the case here. Rather, the plaintiffs have melded a number of potential classes into a single proceeding. The result is an ambitious action that vastly overreaches and which, consequently, is void of the essential element of commonality necessary to obtain certification as a class proceeding. Simply put, the reason that no acceptable class definition has been posited is that no such definition exists.

Absent an identifiable class, it was simply not feasible to attempt to craft common issues.

In 2006, Justice Winkler granted leave to discontinue the action: see *Caputo v. Imperial Tobacco*, [2006] O.J. No. 537 (S.C.J.).

Ragoonanan was less ambitious, but suffered a similar fate. The gist of the complaint was that the defendant's cigarettes were negligently designed and manufactured, since the defendant knew or ought to have known that the cigarettes were not "fire safe" – i.e., they did not extinguish themselves – and knew how to manufacture and sell a fire safe cigarette.[29]

Again, plaintiffs' counsel struggled to craft an appropriate and acceptable class definition, given the claims advanced in the action. They proposed at least four different alternatives, including two at the certification hearing.[30] None of the proposed definitions were acceptable to Cullity J., and he went on to say that no acceptable definition was apparent to him either.[31]

Once again, making the necessary connections between the causes of action, the alleged "defect" and harm, and an identifiable class proved impossible.

In *Knight*, plaintiff's counsel took a quite different approach. Instead of a conventional products liability claim, the plaintiff advanced a "consumer protection" claim under the B.C. *Trade Practice Act* ("*TPA*") and the *Business Practices and Consumer Protection Act* (its successor) (the "*BPCPA*"), claiming that the defendant has represented that "light" or "mild" cigarettes were less harmful than regular cigarettes when in fact they were not.

The statement of claim also contained a specific allegation that the plaintiff did not seek to recover damages for personal injuries. Instead, the *Knight* plaintiff sought an aggregate award that could be distributed (in part) to charitable institutions involved in researching and treating illnesses relation to smoking.

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[29] Relatives of the plaintiffs had died in a fire alleged to have been caused by a cigarette igniting upholstered furniture.

[30] See *Ragoonanan*, paras. 31 and following for the various attempts.

[31] *Ragoonanan*, para. 47-48.

Unlike the tortured attempts at class definition found in *Caputo* and *Ragoonanan*, the class definition in *Knight* was relatively straightforward: Persons who, during the Class Period, purchased the Defendant's light or mild brands of cigarettes in British Columbia for personal, family or household use. The "Class Period" was the period from July 5, 1974, being the proclamation into force of the *TPA*, up to the opt-out / opt-in date set by the Court in the proceeding.[32]

The common issues certified were:[33]

(i) Are the sales of the defendant's light and mild brands of cigarettes to class members for the class members' personal, family or household use "consumer transactions" as defined in the *TPA* and/or *BPCPA*?

(ii) Are the solicitations and promotions by the defendant of its light and mild brands of cigarettes to class members for the class members' personal, family or household use "consumer transactions" as defined in the *TPA* and/or *BPCPA*?

(iii) With respect to the sales in British Columbia of the defendant's light and mild brands of cigarettes to class members for the class members' personal, family or household use, is the defendant a "supplier" as defined in the *TPA* and/or *BPCPA*?

(iv) Are the class members "consumers" as defined in the *TPA* and/or *BPCPA*?

(v) Did the defendant engage in deceptive acts or practices in the solicitation, offer, advertisement and promotion of its light and mild brands of cigarettes contrary to the *TPA* and/or *BPCPA*, as alleged in the statement of claim?

(vi) If the Court finds that the Defendant has engaged in deceptive acts or practices contrary to the *TPA* and/or *BPCPA*, should an injunction be granted restraining the Defendant from engaging or attempting to engage in those acts or practices?

(vii) If the Court finds that the Defendant has engaged in deceptive acts or practices contrary to the *TPA* and/or *BPCPA*, should the Defendant be required to advertise the Court's judgment, declaration, order or injunction and, if so, on what terms or conditions?

(viii) If the Court finds that the Defendant has engaged in deceptive acts or practices contrary to the *TPA* and/or *BPCPA*, should a monetary award be made in favour of the class and, if so, in what amount?

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[32] *Knight*, para. 2. The Court of Appeal reduced the commencement of the class period within which damages could be claimed to May 8, 1997, and to which any declaratory relief was available to July 4, 2004 onwards.

[33] *Knight Appeal*, para. 5. On appeal, the time period for issues (viii) and (ix) was limited to the period beginning May 8, 1997.

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(ix) If the Court finds that the Defendant has engaged in deceptive acts or practices contrary to the *TPA*, should punitive or exemplary damages be awarded against the Defendant and, if so, in what amount?

(x) Did the Defendant wilfully conceal material facts relating to the causes of action asserted in this proceeding?

(xi) Whether the defendant's interactions with the government of Canada constitute a defence to claims under the *TPA*?

(xii) Whether the doctrine of volenti non fit injuria constitutes a defence to claims under the *TPA*?

(xiii) Whether the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333 relating to the defence of contributory negligence have any application to a claim under the *TPA*?

These were not typical "products liability issues." However, they were firmly grounded in the basic complaints in the action, focussed squarely on conduct of the defendant, and minimized any individual issues or participation by class members. Although *Knight* lacked the scope and ambition of *Caputo* and *Ragoonanan*, it succeeded where they failed.

CONCLUSION

Advancing a products liability claim does not guarantee that a plaintiff's case will be certified as a class action. Identification of defects (e.g., a door locking system that does not prevent break-ins; a non "fire-safe" cigarette, cigarettes generally) is not enough, if plaintiff's counsel is unable sufficiently to connect the defect with resulting harm, frame an identifiable class and common issues, or provide the court with admissible evidence that the alleged defects and harm can likely be proved on a class-wide basis. Indeed, sometimes thinking "out-of-the-box" and recasting the case as something different – as in *Knight* – is necessary.

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The question whether a class proceeding is the "preferable procedure" remains a major battleground on contested certification applications.[34] However, formulation of the class description and appropriate framing of common issues – based on thoughtfully selected and pleaded claims – are critical to success or failure on certification. An early stumble here will be fatal for plaintiffs' counsel, and difficulty in framing a clear class definition can be a strong signal that the case ultimately will not satisfy the certification requirements. A defendant does not need to show that none of the certification requirements have been met, just one of them.

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[34] However, judges are rejecting many of defendants' typical arguments on preferability: see, e.g., *Cloud v. Canada* (2004), 247 D.L.R. (4th) 667 (Ont. C.A.), reversing (2003), 65 O.R. (3d) 492 (Div. Ct.), *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.), *Cassano v. Toronto-Dominion Bank* (2007), 87 O.R. (3d) 401 (C.A.), and *LeFrancois v. Guidant*.

CASE LIST

Andersen v. St. Jude Medical Inc. (2003), 67 O.R. (3d) 136 (S.C.J.), leave to appeal refused [2005] O.J. No. 269

Bendall v. McGhan Medical Corp. (1993), 106 D.L.R. (4th) 339 (Ont. G.D.), leave to appeal refused [1993] O.J. No. 4210

Benning v. Volkswagen Canada Inc. and others, 2006 BCSC 1292

Bouchanskaia v. Bayer Inc., [2003] B.C.J. No. 1969 (S.C.)

Boulanger v. Johnson & Johnson, [2007] O.J. No. 179 (S.C), leave to appeal refused [2007] O.J. No. 1991

Campbell v. Flexwatt Corp. (1996), 25 B.C.L.R. (3d) 329 (S.C.), aff'd (1998), 44 B.C.L.R. (3d) 343 (C.A.)

Caputo v. Imperial Tobacco Ltd. (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.)

Caputo v. Imperial Tobacco, [2006] O.J. No. 537 (S.C.J.)

Cassano v. Toronto-Dominion Bank (2007), 87 O.R. (3d) 401 (C.A.)

Chace v. Crane Canada Inc. (1997), 26 B.C.L.R. (3d) 339 (S.C.), aff'd (1998), 44 B.C.L.R. (3d) 264 (C.A.)

Cloud v. Canada (2004), 247 D.L.R. (4th) 667 (Ont. C.A.), reversing (2003), 65 O.R. (3d) 492 (Div. Ct.)

Collette v. Great Pacific Management Co. (2004), 26 B.C.L.R. (4th) 252 (C.A.)

Endean v. Canadian Red Cross Society (1997), 36 B.C.L.R. (3d) 350 (S.C.), rev'd in part (1998), 48 B.C.L.R. (3d) 90 (C.A.)

Ernewein v. General Motors of Canada Ltd. (2005), 46 B.C.L.R. (4th) 234 (C.A.), 2006 BCCA 540

Harrington v. Dow Corning Corp. (1996), 22 B.C.L.R. (3d) 97 (S.C.), aff'd (2000), 82 B.C.L.R. (3d) 1 (C.A.)

Heward v. Eli Lilly & Company, [2007] O.J. No. 404 (S.C.J.), leave to appeal granted in part [2007] O.J. No. 2709

Hoy v. Medtronic, Inc. (2002), 21 C.P.C. (5th) 86 (B.C.S.C.), 2002 BCSC 1648

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Hoy v. Medtronic, Inc. (2002), 94 B.C.L.R. (3d) 169 (S.C.), aff'd (2003), 14 B.C.L.R. (4th) 32 (C.A.)

Hoy v. Medtronic, Inc., 2003 BCSC 666

Hoy v. Medtronic, Inc., 2004 BCSC 440

Knight v. Imperial Tobacco Canada Limited (2005), 250 D.L.R. (4th) 347 (B.C.S.C.), varied (2006), 54 B.C.L.R. (4th) 204 (C.A.) 2006 BCCA 235

LeFrancois v. Guidant Corporation and others, 2008 CanLII 15770 (Ont. S.C.J.)

Markson v. MBNA Canada Bank (2007), 85 O.R. (3d) 321 (C.A.)

Nanaimo Immigrant Settlement Society v. British Columbia (2001), 84 B.C.L.R. (3d) 208 (C.A.)

Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 127 D.L.R. (4th) 552 (Ont. G.D.), leave to appeal refused 129 D.L.R. (4th) 110, leave to appeal refused (1996), 7 C.P.C. (4th) 206 (Ont. C.A.)

Olsen v. Behr Process Corporation, (2003), 17 B.C.L.R. (4th) 315 (S.C.)

Peter v. Medtronic, Inc., [2007] O.J. No. 4828 (S.C.J.)

Poulin v. Ford Motor Company of Canada (2007), 35 C.P.C. (6th) 264, [2006] O.J. No. 4625 (S.C.J.)

Ragoonanan v. Imperial Tobacco Canada Limited (2005), 78 O.R. (3d) 98 (S.C.J.)

Reid v. Ford Motor Company, 2003 BCSC 1632

Reid v. Ford Motor Company, 2006 BCSC 712

Rumley v. British Columbia (2001), 205 D.L.R. (4th) 39 (S.C.C.)

Scott v. TD Waterhouse Investor Services (2001), 94 B.C.L.R. (3d) 320 (S.C.)

Serhan v. Johnson & Johnson (2004), 72 O.R. (3d) 296 (S.C.J.), aff'd (2006), 85 O.R. (3d) 665 (Div. Ct.), leave to appeal refused [2006] S.C.C.A. 494

Soulos v. Korkontzilas (1997), 146 D.L.R. (4th) 214 (S.C.C.)

Wilson v. Servier Canada Inc. (2000), 50 O.R. (3d) 219 (S.C.J.)