AS THE PENDULUM SWINGS: MEDICAL PRODUCTS CLASS ACTION LITIGATION IN CANADA – RECENT DEVELOPMENTS

By: Peter J. Pliszka & Sarah J. Armstrong
Fasken Martineau DuMoulin LLP

Introduction

During the relatively short history of class proceedings in Canada, developers and manufacturers of medical devices and pharmaceuticals (“medical products”) have found themselves at the receiving end of a significant number of class action claims. To date, the main battleground in respect of these claims has been the certification motion, a preliminary step in which the court assesses whether or not a given claim should proceed as a class action. Overall, the certification case law weighs heavily in favour of certifying proposed class proceedings involving medical products. However, a few recent certification decisions signal to both plaintiffs and defendants that, despite the track record to date, certification in medical products cases is not simply a rubber stamp; the allegations and evidence presented in each individual case really are supposed to be reviewed and rigorously analyzed by the court to determine whether a given case meets the test of suitability for class treatment. Of the medical products cases which have been certified in Canada, only one has advanced all the way to trial – Andersen v. St. Jude. In contrast, a substantial number of the others have settled after certification, while the remainder have stalled through the post-certification litigation process. The recent decision of the Ontario Superior Court of Justice in Anderson v. St. Jude, in which the court found no liability on the part of St. Jude, highlights the enormous complexity and cost of a common issues class action trial, the importance of expert evidence in a medical products lawsuit, and the risk assumed by both parties in deciding to proceed to trial.

Query whether these recent successes for the defence, in aggregate, constitute a trend, and reflect a reverse swinging of the judicial pendulum back towards the centre of the certification arc between plaintiffs and defendants.

This paper will discuss these recent developments in Canada. The paper comprises five parts. Part I will provide an overview of Canada’s class action regimes. Part II will discuss class action claims involving medical products designed for patients with diabetes. Part III will describe the process of bringing a medical products class action claim to trial, with a particular focus on the certification process and consider whether certain recent dismissals of certification motions
represent a trend in the law toward raising the threshold that plaintiffs must meet to obtain certification of a proposed class action. Part IV will summarize the recent medical device common issues trial decision in *Andersen v. St. Jude*, and identify some key messages from that trial decision. Finally, part V will summarize an emerging legal issue in Canadian class action litigation, waiver of tort, which has significant potential implications for suppliers of medical products and other products generally.

PART I: PRODUCT LIABILITY CLASS ACTIONS IN ONTARIO: A BRIEF HISTORY

Class proceedings in some provinces in Canada are still a relatively recent phenomenon. Quebec was the first province to enact class proceedings legislation in 1978. Since that time, the number of Canadian jurisdictions that have class proceedings legislation has expanded to all but one province (Prince Edward Island); in addition, the three territories, Nunavut, Yukon, and the Northwest Territories, do not yet have class-action legislation.3

Class action legislation is fairly similar across all of the provinces, as is the case law which interprets and applies that legislation. For simplicity, this paper will focus primarily on the province of Ontario, Canada’s largest and most populous province, which enacted its class action legislation, the *Class Proceedings Act*4, in 1992.

In 1982, the Ontario Law Reform Commission released a report recommending significant legislative reform to facilitate class proceedings in Ontario. Even at that very early stage, the Commission opined that product liability cases would, in its view, be more than appropriate for class action treatment.5 Given the report’s findings, few were surprised that, when the *Class Proceedings Act* was finally introduced in 1992, product liability cases quickly became treated by plaintiffs’ counsel, and many judges, as the “quintessential” model for the class action process.6 Courts were quick to point out that cases involving a single purpose product, which is alleged to be defective or dangerous, provides a certain commonality for which a class proceeding is ideally suited.7

Due in part to this supportive legal climate, the past twenty years has seen Canadian courts address numerous medical product liability class actions, many of which have been based, at least in part, on recalls, or failures to recall where a recall was, allegedly, warranted. Most of these cases have followed on the heels of mass aggregate claims commenced in the United States dealing with similar allegations about the same products.

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5 The commission pointed out that the new class action legislation would “remove several significant obstacles that face consumers…in their attempt to redress harm resulting from defective products”. See: *Ontario Law Reform Commission, Report on Class Actions*, vol 1 (Toronto: Ministry of the Attorney General, 1982) at 264.


7 *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 OR (3d) 130 (available on QL).
The First Battleground: The Certification Motion

In Ontario, a class proceeding is commenced by the issuance of a Statement of Claim, with or without a Notice of Action. The plaintiff is then required to apply to the court to have the action “certified” as a class proceeding. Certification is a purely procedural step during which the court decides whether or not a class proceeding is an appropriate and preferable procedure to advance the common issues in the case.

The importance of this stage in the process, even though it does not involve any adjudication on the merits of the case, is not to be underestimated. The fact is, a great many putative class actions are “won” or “lost” at this preliminary stage. In the words of Justice Lax of the Ontario Superior Court, “The reality is that the battleground of class proceedings in Ontario is the certification motion”.8

In general terms, the certification requirements in Ontario are similar to those in all of the provinces, with the exception of Quebec, where the certification requirements are somewhat less restrictive. Pursuant to section 5 of Ontario’s Class Proceedings Act, the court must grant certification of a proposed class action where:

(a) The pleadings or the notice of application discloses a cause of action;

(b) There is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) The claims or defences of the class members raise common issues;

(d) A class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) There is a representative plaintiff or defendant who

   (i) Would fairly and adequately represent the interest of the class,

   (ii) Has produced a plan for the proceeding that sets out a workable method of advancing the proceedings on behalf of the class and of notifying class members of the proceeding; and

   (iii) Does not have, on the common issues for the class, an interest in conflict with the interest of other class members.9

These requirements are linked: “There must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers”.10

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8 Fresco v. Canadian Imperial Bank of Commerce, 2010 ONSC 1036 (CanLII) at para 3.
9 Class Proceedings, supra note 4 at s 5.
The language of the statute is mandatory: the court is required to grant certification if all five tests are met. Ontario courts have stated that the purpose of a certification motion is to determine how the litigation is to proceed (i.e. whether the claims can appropriately be prosecuted as a class action) and not to review the merits of the plaintiff’s claim. As such, rather than focusing on the action’s likelihood of success, judges have chosen to apply the certification test in what they perceive to be a purposive and generous manner, so as “to give effect to the important goals of class actions – providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers and encouraging them to modify their behaviour”.

PART II: CLASS ACTIONS INVOLVING MEDICAL PRODUCTS FOR TREATING DIABETES

A handful of the medical product class action cases in Canada have involved drugs and products designed specifically for patients with diabetes. For example, Serhan (Trustee of) v. Johnson & Johnson, involved claims regarding Johnson & Johnson’s SureStep System, which was designed for use by diabetics to monitor their blood glucose levels. In order to obtain a blood glucose level reading, the individual pricks his or her finger using a lancet and applies a drop of blood to the membrane on a reagent test strip. The SureStep System was released in the US and Canadian markets despite several alleged defects of which the defendants admitted they were aware. First, it was alleged that there were errors in the monitor’s software that resulted in the meter giving incorrect readings. Second, it was alleged that if users failed to completely insert their test strips into the meter, the SureStep could potentially give a lower than accurate blood glucose reading. The defendants corrected the design errors and undertook a voluntary recall of the affected products. There was no evidence of any injury in Canada arising from either of the design issues.

A class action lawsuit was commenced in 2001 in Ontario claiming damages for negligence, negligent and fraudulent misrepresentation, breach of the Competition Act, and conspiracy relating to the manufacture, sale and distribution of the SureStep Meters and strips, against the defendants, on behalf of users of the device in all Canadian provinces except for British Columbia and Quebec. The case was certified in part, with the cause of action being waiver of tort, a concept which will be discussed in greater detail below. The action was eventually settled in 2011 for a total payment of $4 million.

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13 Ibid.
15 Ibid at para 6.
16 Serhan, supra note 14 at para 7.
17 RSC 1985, c C-34.
18 Companion actions were brought in Quebec and British Columbia.
In 2007, a proposed class proceeding entitled *Wall Estate v. Glaxosmithkline*\(^{20}\) was commenced on behalf of persons resident in Canada who were allegedly negatively affected by Avandia, a prescription drug used to treat Type II diabetes. The claim alleges, among other things, that the defendants, who developed, manufactured and sold the drug, failed to warn the public of the risks associated with taking Avandia, including an increased risk of heart failure and death.\(^{21}\) The issue of whether this proposed class action will be certified by the court has not yet been determined, and no decision has been made on the merits of the plaintiffs’ claims.

Most recently, in December 2011, a proposed class action was brought against Takeda Pharmaceutical Company Limited and related defendants with regard to their product, ACTOS. ACTOS, which the Takeda defendants had researched, developed and distributed, was being prescribed to patients suffering from Type II Diabetes. The plaintiffs allege, among other things, that ACTOS is defective and inherently dangerous in that it caused, materially contributed to, and materially increased, the risks of bladder cancer and bone fractures and that the defendants failed to adequately warn patients about these risks.\(^{22}\) The case is still pending class certification and no decision has been made on the merits of the plaintiffs’ claims.

Beyond these diabetes-related cases, medical products class action claims have been commenced in Canada in respect of virtually all types of pharmaceuticals and medical devices, including antipsychotic medication, diet drugs, pacemakers, defibrillators, and myriad other forms of medical implants.

**PART III: THE POTENTIAL OF CERTIFICATION: ARE CANADIAN COURTS BEGINNING TO RAISE THE BAR FOR CERTIFICATION?**

Until recently, the Ontario cases which had interpreted and applied the requirements for certification, particularly in the context of medical products claims, had set what appeared to be an exceedingly low bar or threshold to be met for each element of the certification test. This trend made it very challenging for defendants in class proceedings to defeat certification.\(^{23}\)

However, a few recent decisions suggest that Ontario courts may now be questioning that liberal approach to certification, and might now be more inclined to scrutinize more discriminatingly each proposed class action case to determine whether it really is reasonable and fair to allow it to proceed as a class action.

In *Martin v. AstraZeneca Pharmaceuticals PLC*\(^{24}\), a decision released in May 2012, the Ontario Superior Court refused to certify a class action relating to the antipsychotic drug, Seroquel, and


\(^{21}\) *Ibid* at para 3.

\(^{22}\) *Casseres v. Takeda Pharmaceuticals et al*, CV-11-442584. The statement of claim in this matter was issued on December 21, 2011. We are not aware of any reported decisions in respect of this case.

\(^{23}\) See, for example, the certification decisions in: *Jones v. Zimmer GMBH*, 2011 BCSC 1198 (CanLII); *Lefrancois v. Guidant Corporation*, 2008 CanLII 15770 (ON SC), leave to appeal to the Ont Div Ct refused, 2009 CanLII 76, 245 OAC 213 (ON SCDC); *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 1942 (CanLII); *Lambert v. Guidant Corporation*, 2009 CanLII 23379 (ON SC), leave to appeal to the Ont Div Ct refused, 2009 CanLII 58583 (ON SCDC); *Schroder v. DJO Canada Inc.*, 2010 SKQB 125 (CanLII), aff’d 2011 SKCA 106 (CanLII).

\(^{24}\) *Martin*, supra note 12.
the side-effect health risks it is alleged to cause. Remarkably, this 2012 decision was the first Ontario Superior Court decision refusing to certify a proposed class action involving a pharmaceutical product.

Seroquel is an antipsychotic medication approved by Health Canada for use in the treatment of schizophrenia, the acute management of manic episodes, bipolar disorder, and depression associated with bipolar I and II disorder. The drug was also being prescribed for certain off-label uses, including treatment of anxiety, sleep disorders, and dementia. The plaintiffs made a broad range of allegations against Astrazeneca, including that the drug caused significant health risks to those who used it and that the defendants had failed to warn class members of these risks, which included significant weight gain, problems with balance, elevated blood sugars, hyperglycaemia, loss of energy, numbness in the extremities, pancreatitis, blindness, et al. The plaintiffs also alleged, among other things, that the defendants had been negligent in the design, manufacture and distribution of the drug and that the defendants had conspired to conceal information from Health Canada and to promote the drug for certain off-label uses for which it had not been approved. The proposed class was “all persons in Canada who were prescribed, and who consumed, Seroquel”.

In denying certification, Justice Horkins commenced with a recitation of the well-established legal principle that, on a certification motion, the evidentiary burden on plaintiffs is low: all that the plaintiffs are required to do is to adduce evidence that shows “some basis in fact” to meet the requirements of s. 5(1) (b) to (e) of the test for certification as a class action. Justice Horkins also noted that a defendant is entitled to deliver evidence in rebuttal, but the standard of proof on the defendant is inversely heavy: the defendant must show that there is no basis in the evidence for the facts asserted by the plaintiffs. Nevertheless, and notwithstanding the extensive evidence filed on the motion by both the plaintiffs and the defendants, Justice Horkins found that plaintiffs had failed to satisfy every element of the certification test.

In this respect, the Court ruled as follows:

(1) The plaintiffs’ pleading was “seriously deficient” and failed to disclose a cause of action. In the court’s view, the pleadings were inconsistent, lacked clarity, failed to provide particulars, lacked material facts, and failed to identify the specific acts undertaken by the defendant which supported their claim;

(2) The plaintiffs failed to provide a sufficient evidentiary basis to establish that a class of two or more persons exists (it was not sufficient for plaintiffs’ counsel to simply point to potential class

25 Martin, supra note 12 at para 2.
26 Martin, supra note 12 at para 3.
27 Martin, supra note 12 at paras 6 – 9.
29 Martin, supra note 12 at para 5.
30 Martin, supra note 12 at para. 23.
31 Martin, supra note 12 at para. 24.
32 Martin, supra note 12 at para 108.
members who had contacted them, without any evidence about the nature of the contact)\(^{34}\) and the proposed class definition was overbroad (it should have, at a minimum, been bounded by a start date when Seroquel was first introduced in Canada)\(^{35}\);

(3) None of the common issues proposed by the plaintiffs were issues common to the class, the resolution of which would significantly advance the proceeding.\(^{36}\) This included the “general causation” question of whether Seroquel can cause weight gain and diabetes. The court held that, even if this common issue was resolved in favour of the plaintiffs, the plaintiffs did not provide any evidence to show that a methodology exists whereby general population data (or some other approach) could be used to assess this issue in common and arrive at an answer that would be of any use to the class. Each plaintiff would still have to prove that Seroquel caused his or her weight gain and/or diabetes\(^{37}\);

(4) Given that there was no single common issue that would significantly advance the litigation for the class, the court felt there was no reason to conclude that a class action would be a fair, efficient, and manageable method for advancing the claim\(^{38}\); and

(5) The proposed representative plaintiffs were not suitable candidates to represent the proposed class because they were not adequately informed about the action and did not have a real interest in the action.\(^{39}\)

Justice Horkins’ decision is instructive for both plaintiffs and defendants in medical products class proceedings. The court’s extensive, methodical and detailed analysis of the claim in relation to the criteria for certification has the potential, if followed by other judges, to enliven the level of scrutiny applied to future certification motions involving medical products. The message sent to litigants by the ruling is clear: certification should not be assumed, even in product liability cases, and even where the claims and proposed common issues closely mirror those put forward in previous certified cases. Whether a given case is certified by the court will not turn on whether claims involving similar issues have previously been certified by the court. Rather, certification will depend on the evidence filed by the parties and the adequacy of the presentation of the plaintiffs’ case as it relates to the five criteria for certification set out above.\(^{40}\)

Shortly before Horkins, J. released her decision in \textit{Martin}, another judge on Ontario’s class actions panel – Justice Strathy – released a decision which denied certification in the case of \textit{Williams v. Canon Canada Inc.}\(^{41}\) While this case did not involve a medical product (rather it

\(\text{\textsuperscript{34} Martin, supra note 12 at para 203.}\)
\(\text{\textsuperscript{35} Martin, supra note 12 at para 208.}\)
\(\text{\textsuperscript{36} Martin, supra note 12 at paras 210-353.}\)
\(\text{\textsuperscript{37} Martin, supra note 12 at para. 248.}\)
\(\text{\textsuperscript{38} Martin, supra note 12 at paras 358 – 360.}\)
\(\text{\textsuperscript{39} Martin, supra note 12 at para 368.}\)
\(\text{\textsuperscript{40} Ontario has a “loser pays” costs system. The plaintiffs in Martin have since been ordered to pay costs to the defendants in respect of their unsuccessful certification motion in the amount of $475,000 plus applicable taxes and disbursements (see Martin v. Astrazeneca et al, 2012 ONSC 4666 (CanLII)).}\)
\(\text{\textsuperscript{41} 2011 ONSC 6571 [Canon], aff’d 2012 ONSC 3692 (Ont Div Ct). Fasken Martineau DuMoulin LLP represented the defendants in Canon. The plaintiffs have filed a motion for leave to appeal the Divisional Court’s decision to the Ontario Court of Appeal.}\)
alleged a defect in a line of Canon cameras), Strathy J.’s decision is relevant to class actions involving product liability claims of all types because, similar to Horkins J.’s decision, it reinforces the role of the court as a “gatekeeper” on a certification motion, and it reminds the parties that the evidence tendered on a certification motion, including expert evidence, must meet the usual criteria for admissibility.

The plaintiffs had moved for certification of a proposed class proceeding on behalf of a class of owners of 20 different models of cameras in Canon’s PowerShot line which were all manufactured by Canon Inc. and distributed in Canada by Canon Canada Inc. The plaintiffs argued that the cameras would show an E18 error message, caused by an alleged defect in their design or manufacture. They argued, among other things, that this error made the cameras unfit for their intended use.42

Strathy J. refused to certify the class action, stating that the plaintiffs had failed the section 5 certification test. Of particular note is the court’s analysis of the admissibility of the evidence proffered by the plaintiff in an effort to establish the existence of common issues. The first “expert” was a person purporting to have expertise in “consumer product failure”, who was retained by the plaintiffs to examine cameras allegedly suffering from the E18 error message.43 The second was an expert in web analytics and statistics, retained to determine whether the E18 error affected a large number of consumers based on E18’s internet presence and the level of web chatter on the topic.44

The purported expert evidence of these witnesses was challenged by the defendants on the basis that these witnesses were not properly qualified and did not meet the well-established Canadian test for the admissibility of expert evidence.45 Strathy J. agreed with the defendants in respect of both witnesses, finding that neither was adequately qualified to give evidence on the issues upon which they had opined. The qualifications of both witnesses were largely self-imposed, and they lacked the requisite expertise in the field.46

Upon deeming that evidence inadmissible, Strathy J. was left with the question of whether there was a sufficient evidentiary basis to establish a common design defect in the cameras, one that amounted to a common issue for the purposes of meeting that element of the test for certification as a class proceeding. While the court recognized that the evidentiary burden on a certification motion is low (namely, that all the plaintiff has to do is show some “basis in fact” for the common issue), this burden must be discharged by relevant and admissible evidence.48 The court held that without the “expert” evidence, there was nothing left to support the plaintiff’s claim of a common issue.49 On this basis, the motion for certification was denied.50

42 Ibid at para 3.
43 Canon, supra note 41 at para 14.
44 Canon, supra note 41 at para 17.
45 Canon, supra note 41 at para 77.
46 Canon, supra note 41 at para 89.
47 Canon, supra note 41 at paras 108, 110.
48 Canon, supra note 41 at para 65.
49 Canon, supra note 41 at paras 262 – 263.
50 Canon, supra note 41 at para 271.
This decision, which has since been affirmed by the Ontario Divisional Court on appeal\[^{51}\], is important because, consistent with Horkins J’s decision in *Martin v. AstraZeneca*, it confirms that, notwithstanding the relatively low bar the legislation sets for certifying an action as a class proceeding, courts are expected to carefully scrutinize the proposed evidence at the certification stage in order to determine whether it is admissible. The test for admissibility of expert evidence, which involves properly qualifying the expert in the area upon which his/her evidence is proffered, is not relaxed at certification. Second, it confirms that while the courts do not require much in the way of evidence on a certification motion, speculation and unsubstantiated assertions are insufficient to meet the threshold.

As the foregoing discussion has illustrated, contrary to the perception among some plaintiffs’ counsel, certification is not a foregone conclusion in product liability class action proceedings in Canada. The recent case law appears to suggest that a move is afoot towards a more robust application of the test for certification, complete with a disciplined application of evidentiary rules regarding admissibility of expert evidence, even where seemingly similar claims have been certified in the past. If this is the beginning of a trend toward applying the class action certification test in a way which many on the defence side have long thought is the approach that accords with the legislative intent of the class proceedings statutes, it will no be welcome news for manufacturers and sellers of medical products.

**PART IV: MEDICAL PRODUCTS ON TRIAL**

Once a class action is certified, plaintiffs and defendants turn their focus to the possibility of a trial of the common issues. Even though class actions have existed in some provinces in Canada for over two decades, relatively few cases have proceeded all the way to trial.\[^{52}\] Most cases have settled before the trial stage is ever reached. As a result, the body of case law precedents of trial adjudications from class action common issues trials is relatively sparse. This is especially true in the context of medical products class actions. As of August 2012, only one medical products case had gone to trial in Canada, *Andersen v. St. Jude Medical Inc.* (“*Andersen*”).\[^{53}\]

This case was about the safety of mechanical prosthetic heart valves and annuloplasty rings that were manufactured by the defendant.\[^{54}\] The prostheses in question were coated with a proprietary mixture called Silzone, which was designed to inhibit the growth of post-operative bacteria.\[^{55}\] The plaintiffs claimed that Silzone interfered with tissue healing and impaired the body’s ability to incorporate the medical devices, thereby causing or contributing to a number of medical complications.\[^{56}\] St. Jude voluntarily recalled all Silzone-coated products in the year 2000 based on its own testing. The central issue in the case was whether there had been a breach of duty by the defendants, causing injury.

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\[^{51}\textit{Williams v. Canon Canada Inc.}, 2012 ONSC 3692 (CanLII).\]

\[^{52}\text{Class action cases which have proceeded to trial in Canada include actions involving securities issues, environmental claims, pension and benefit disputes, real estate deposits, investments in recreational facilities, constitutional challenges, consumer product disputes, unsatisfactory arrangements made by travel companies, and consumer credit card disputes.}\]

\[^{53}\text{2012 ONSC 3660 (CanLII) [}\textit{Andersen}\text{].}\]

\[^{54}\textit{Ibid} at para 1.\]

\[^{55}\textit{Andersen, supra} note 53 at para 2.\]

\[^{56}\textit{Andersen, supra} note 53 at para 5.\]
The plaintiffs were ultimately unsuccessful at trial – the court dismissed their claim in its entirety. However, in terms of its relevance to the Canadian legal landscape, the actual end result of the case is secondary. The primary significance of Andersen is how it exemplifies the enormous complexity and cost of a common issues medical products class action trial. The trial judge (Justice Lax) described the vast body of evidence before her in Andersen as follows:

“Some 2,293 documents were introduced as evidence…with many exhibits running to hundreds of pages. The court heard testimony for 138 days from 40 witnesses, including 23 expert witnesses from 14 different disciplines in science and medicine. At the conclusion of the evidence, the parties delivered voluminous written submissions over a period of several months”.

The Andersen decision also highlights the important role that expert medical evidence plays in medical products class action proceedings. In her 202-page decision, Justice Lax spent a significant amount of time assessing the extensive expert evidence that was presented at trial. The reliability of the competing expert evidence informed nearly every element of her ruling, most notably her examination of the issues of causation. The rigorous and methodical way in which Justice Lax approached and weighed the expert evidence based on a generally accepted hierarchy within the scientific literature is instructive; it should send a clear signal to litigants about the important role that experts play in pursing or defending a medical products class action claim. Ensuring that the expert evidence which supports one’s case is objective, robust and methodologically sound can mean the difference between success and failure, should the claim go to trial.

PART V: WAIVER OF TORT – AN EMERGING ISSUE IN CLASS ACTION LITIGATION IN CANADA

One aspect of Canadian class action law which has caused significant uncertainty and unpredictability for defendants across many sectors (including in the medical products industry) in recent years is the legal concept of waiver of tort. Waiver of tort is a restitutionary doctrine rooted in old English law which “permits a plaintiff to recover benefits a defendant has obtained by its wrongdoing instead of damages measured by a plaintiff’s loss”.

For the past several years, plaintiffs in Canadian product liability class action proceedings have routinely alleged waiver of tort, as an alternative to the tort of negligence. Plaintiffs argue that the defendant should be required to disgorge profits garnered from a defective product if a finding of negligence is made. Waiver of tort is attractive to plaintiffs’ lawyers in the class action context because it relieves plaintiffs of the need to prove individual damages, which is a mandatory element of the tort of negligence, as long as the plaintiff proves that the defendant engaged in some wrongdoing (i.e., if a plaintiff cannot prove that it suffered any legally recoverable loss, then it has failed to establish liability on the part of the defendant, even if the

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57 Andersen, supra note 53 at para 8.
58 Andersen, supra note 53 at para 42.
59 Koubi v. Mazda Canada Inc., 2012 BCCA 310 (CanLII) at para 16 [Mazda].
defendant’s conduct may be characterized as “negligent”), which, as demonstrated above, can be an obstacle to certification.

While the attraction of waiver of tort for plaintiffs is obvious, the precise nature and scope of the doctrine is controversial, and it has been the subject of much debate both in the case law and in academic literature.60 On numerous occasions in the past few years, Canadian courts have refused to strike claims framed in waiver of tort at the pleadings or certification stage, and instead have opted to allow waiver of tort claims to be certified as a common issue in the class proceedings context.61 The first such case was the case of Serhan (Trustee of) v. Johnson and Johnson, mentioned previously in Part II, above.

In Serhan the Ontario Superior Court certified a class action based on a waiver of tort claim being a potential cause of action.62 This decision was later upheld on appeal.63 Many had hoped that as the Serhan case made its way through to trial, it would provide an opportunity for the court to fully elaborate on the precise legal nature and scope of waiver of tort in Canadian class action law. However, as previously mentioned, this case was settled prior to trial. As a result, further opportunity for the court to offer any additional elaboration on this issue did not arise.

Similar optimism for long-awaited judicial guidance about waiver of tort arose in anticipation of the release of Justice Lax’s decision in Andersen. However, given her finding of no liability on the part of the defendants, Justice Lax did not need to decide the waiver of tort question. However, Her Honour did state that waiver of tort was an issue that touched on fundamental policy issues, issues that perhaps could be better dealt with by the legislature.64

Since the release of the trial decision Anderson, the British Columbia Court of Appeal has issued a decision in Koubi v. Mazda Canada Inc.66 which significantly narrows the scope of the waiver of tort doctrine in that province, at least. While this case falls outside the medical products field, the court’s commentary on waiver of tort is significant because it states that waiver of tort cannot be used as a remedy for breaches of a statute which provides exhaustive or exclusive remedies for the breach in question.

The claim in Koubi arose from allegedly defective door locks installed in Mazda3 vehicles for the model years 2004 - 2007. The plaintiffs alleged that the defect led to widespread keyless break-ins, resulting in stolen goods as well as damage to the vehicles themselves.67 In seeking

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60 Ibid at para 18. For example, there is an ongoing debate in the case law as to whether waiver of tort is a cause of action or just a remedy.


62 Serhan, supra note 14 at paras 46 – 48.


64 Andersen, supra note 53 at para 593.

65 Andersen, supra note 53 at para 594.

66 Mazda, supra note 59.

67 Mazda, supra note 59 at para 10.
certification of the action, the plaintiffs did not claim recovery of individual damages. Instead, they sought a disgorgement of the profits earned by Mazda arising from the doctrine of waiver of tort. The British Columbia Court of Appeal took this opportunity to assess an issue central to the waiver of tort discussion: is waiver of tort an independent cause of action or is it a remedy?

The court refused to answer this issue definitively, but provided some valuable guidance for cases in which the wrong committed constitutes a statutory breach. The B.C. Court of Appeal commented that class action cases have taken waiver of tort too far beyond its historical roots. In cases where the waiver of tort claim is based on a statutory breach, and the legislation in question provides exhaustive or exclusive remedies for said breach, waiver of tort is not available. Therefore, in the circumstances of a statutory wrong, a class action should not be certified based on a purported cause of action of waiver of tort.

Much remains unsettled in the area of waiver of tort, and there is no doubt that manufacturers of medical products will continue to face the prospect and threat of such claims unless and until courts in Canada resolve this legal issue once and for all.

CONCLUSION

Class actions, including those involving claims about medical products, are a relatively recent phenomenon in Canada. The number of decided medical product class action cases in Canada, relative to the massive body of mass tort cases in this industry in the United States, is small, but it is growing rapidly. Given the presently unsettled nature of Canadian class action law on several issues in this area, coupled with the prospect that the recent Andersen decision may embolden more defendants to refuse to settle and force plaintiffs to go to trial on claims where the defendant believes the class claim lacks merit, the class action pendulum remains in motion. It behooves all affected players to keep their eye on this ball with rapt attention to see where it may move next.

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68 Mazda, supra note 59 at para 10.
69 Mazda, supra note 59 at para 40.
70 Mazda, supra note 59 at para 79.
71 Mazda, supra note 59 at paras 79 – 80.