IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Fakhri et al. v. Alfalfa's Canada Inc. cba Capers,*** 2003 BCSC 1717

Date: 20031117
Docket: L02398
Registry: Vancouver

Between:

HELEN FAKHRI
AND
ADY AYLON
as representative Plaintiffs

Plaintiffs

And

ALFALFA'S CANADA, INC.
CARRYING ON BUSINESS AS
CAPERS COMMUNITY MARKET

Defendant

Brought under the
Class Proceedings Act, R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for the Plaintiffs	David A. Klein
Counsel for the Defendant	Elaine J. Adair Warren B. Milman and Michelle S.Lawrence
Date and Place of Hearing:	October 20 and 21, 2003 Vancouver, B.C.

[1] The plaintiffs apply to have their action certified as a class proceeding pursuant to the ***Class Proceeding Act***, R.S.B.C. 1996, c. 50.

[2] The plaintiffs' action is for damages for injuries and losses which the plaintiffs allege resulted from the defendant's ("Capers") production, manufacture, distribution and sale of food products that were or might have been tainted with the Hepatitis A virus (the "food products").

[3] The plaintiffs apply to have Ady Aylon appointed as representative plaintiff and for related orders pursuant to the ***Act***. The issue is whether Mr. Aylon is entitled to prosecute this action on behalf of the class described in the statement of claim.

[4] The plaintiff proposes that the class be comprised of two groups, those who claim to have been infected by the Hepatitis A virus (HAV) and those who did not become ill but received an injection as a result of being exposed to HAV. Ms. Fakhri claims to have become infected by HAV and Mr. Aylon received an injection.

[5] The plaintiffs argue that this type of action should be permitted to proceed as a class action because the claims are modest and the financial burden of prosecuting the claim

would consume all of the proceeds of a judgement of any single plaintiff. As a result, defendants who would otherwise be found responsible would likely be insulated from lawsuits. It is only by spreading the costs of the litigation amongst many that members of the class will have access to justice. ***Nantais v. Telectronics Proprietary (Canada) Ltd.*** (1995), 129 D.L.R. (4th) 110, refusing leave to appeal from (1995), 127 D.L.R. (4th) 552 (Ont. Gen. Div.) at 113.

[6] The defendant submits that it is not appropriate for this case to be certified as a class proceeding as the plaintiff has failed to meet any of the requirements set out in the ***Class Proceedings Act.***

[7] For the following reasons I have concluded that this case should be certified as a class proceeding.

FACTS

[8] Capers carries on business in British Columbia under the name "Capers Community Markets". Capers is a company incorporated under the laws of British Columbia. Subsequent to the filing of this action, Capers amalgamated and the name of the amalgamated company is Wild Oats Markets Canada, Inc.

[9] Capers owns and operates three natural food grocery stores. The stores are located at 2285 West 4th Avenue,

Vancouver, 1675 Robson Street, Vancouver, and 2496 Marine Drive, West Vancouver. Capers also owns and operates a kitchen, called the "Commissary", for the commercial manufacture of food products that are sold at its stores.

[10] On March 26, 2002, the Vancouver Coastal Health Authority (the "Health Authority") notified Capers that a person employed by Capers as a Commissary Supervisor had been diagnosed with HAV and had been infectious with HAV during the time he worked in the Commissary.

[11] On March 27, 2002 the Health Authority issued a news release that there was possible contamination of Capers' food products with HAV. According to the news release, "consumption of certain food items sold at all three Capers locations from March 4, 2002 to March 26, 2002 could have exposed members of the public to the Hepatitis A virus." The release listed the affected items and advised those who consumed them to contact their family doctor and the local health unit office immediately if they developed symptoms of Hepatitis A. The Health Authority also recommended that persons who consumed the implicated products after March 12, 2002 obtain a shot of Immune Serum Globulin (ISG).

[12] The Health Authority set up four ISG clinics at locations near the Capers markets to administer free ISG immunizations to Capers customers.

[13] Hepatitis A is a viral illness that affects the liver, resulting in fatigue, malaise, gastrointestinal symptoms and jaundice (yellow discolouration of the mucous membranes and skin). The severity of the illness varies from asymptomatic or very mild infections to severe infections that may last weeks or months. Some HAV infected persons have prolonged or relapsing symptoms. There is currently no treatment for HAV infection, although rest and proper nutrition can relieve some symptoms. The death rate is 1/1,000 cases, but increase in persons over the age of fifty. The death rate is also higher in people who have other chronic liver disease.

[14] The incubation period for HAV ranges from 15 to 50 days. Infected individuals can spread the virus from two weeks before the symptoms begin to one week after symptoms appear. An infected person who has no symptoms can spread the virus. Infected persons may never feel ill at all. They are still, however, able to spread HAV even if they feel fine themselves.

[15] HAV is transmitted through the fecal-oral route. The virus is excreted in the stool and must enter the mouth of another people for infection to occur. This may occur directly (e.g. changing diapers) or indirectly (e.g. contamination of food resulting from food handling practices). Small amounts of HAV can remain on the hands after a bowel movement, even if hands are washed. HAV is killed by cooking but can be passed on through uncooked food products or handling of food products after cooking.

[16] The most important measures for preventing the spread of HAV are promoting good personal hygiene and proper food handling practices.

[17] HAV infection can be prevented by inoculation with a Hepatitis A vaccine prior to infection. The vaccine is not recommended for use after exposure to HAV. In such situations, an ISG injection can be used as temporary protection against HAV. People who have come into contact with HAV can reduce their risk of becoming ill by receiving an ISG injection as it helps to prevent or improve the clinical manifestations of HAV if given within two weeks of infection. An ISG injection is of little or no benefit when received more than 14 days after exposure to HAV or during the acute phase of HAV infection.

[18] By mid-April, five customers of Capers were diagnosed with HAV after consuming food products. Three of the five had not consumed food products on the March 27, 2002 list of affected items. The indications were that a second food handler could have been infected and the original advisory was expanded to include patrons who consumed Capers products during February 2002.

[19] The expanded list included muffins, hummus and black olive tapenade purchased from Capers in late February or early March. These products were added to the list because the five confirmed HAV infected customers had all consumed those food items.

[20] At the time of the expanded advisory it was too late for some of the people who had handled and/or consumed the food products to receive inoculations.

[21] By the end of the outbreak the Health Authority identified eight individuals who became infected with HAV. Approximately 6,447 people received ISG injections.

[22] Mr. Aylon was a regular customer of Capers who purchased and consumed potato salad, hummus and a variety of juices from Capers during the relevant period. When he originally learned of the advisory of March 27, 2002 he

contacted Capers for advice on what he should do to protect himself. He was told not to worry because the food items he had eaten were not on the list.

[23] After the Health Authority expanded the list, Mr. Aylon went to one of the ISG clinics for an injection. He closed his retail business and waited in line for about four hours before receiving his ISG injection. Soon after receiving the ISG injection, Mr. Aylon experienced muscle stiffness, flushing, headache, weakness and nausea. He reported his condition to the health workers in the ISG clinic who directed him to rest in an area with other persons who were having adverse reactions to the ISG injection. He rested in the designated area for about 45 minutes waiting for the symptoms to resolve before going home.

[24] About three to four hours after arriving home Mr. Aylon experienced the same symptoms again. He went to the emergency ward of the Vancouver General Hospital where he stayed for approximately four hours waiting for medical attention and the results of blood tests. The examining physician advised Mr. Aylon that he was probably having a reaction to the ISG injection and that it was normal for some people to have such a reaction. He went home after receiving the advice.

[25] Several days later, Mr. Aylon experienced the same symptoms again and went to the emergency ward of Vancouver General Hospital where he was examined, put under observation and released after about four hours.

ANALYSIS

[26] The Supreme Court of Canada has held that the ***Class Proceedings Act*** should be construed generously especially at the certification stage. The ***Act*** provides the courts with a procedural tool to deal efficiently and on a principled basis with cases involving vast numbers of interested parties and complex, intertwined legal issues, some which are common and some which are not. Class proceedings have three important advantages over multiple proceedings:

- judicial economy resulting from unnecessary duplication;
- improved access to justice by making economical the prosecution of claims which would otherwise be uneconomical; and
- modifying the behaviour of wrongdoers.

Hollick v. Toronto [2001] 3 S.C.R. 158, ¶ 14 and 15.

[27] The certification stage is not meant to be a test of whether the plaintiff's claim will succeed, i.e. a test of the merits, and turns on the facts. ***Hollick***, ¶ 16 and 37

[28] Although the Court in ***Hollick*** was considering the Ontario statute, the same principles apply in determining whether the plaintiff meets the certification requirements set out in the British Columbia ***Class Proceedings Act***. ***Rumley v. British Columbia,*** [2001] 3 S.C.R. 184, ¶ 25.

[29] Applications for certification are governed by sections 4-9 of the ***Class Proceedings Act***. Section 4(1) mandates certification if the following requirements are met:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

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

(e) there is a representative plaintiff who

(i) would fairly and adequately represent the interests of the class,

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

(iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

Section 4(1)(a) - Cause of Action

[30] The main thrust of the defendant's argument is that the pleadings fail to disclose a cause of action. The test to be applied when considering section 4(1)(a) of the ***Class Proceedings Act*** is the same as that under Rule 19(24) of the ***Rules of Court:*** is it plain and obvious that the pleadings cannot sustain a cause of action? On the application for certification it is the plaintiff who bears the burden of establishing the existence of a cause of action. ***Elms v. Laurentian Bank of Canada*** (2001), 90 B.C.L.R. (3d) 195 (C.A) at 202. Evidence is not considered at this stage; instead, the court assumes that the facts alleged in the pleadings are

true. ***Endean v. Canadian Red Cross Society,*** [1998] 9 W.W.R. 136, 157 D.L.R. (4th) 465 (B.C.C.A.) at ¶ 7 and 8.

[31] The plaintiffs' claim is framed in negligence, breach of contract and breach of implied conditions and warranties under the ***Sale of Goods Act***, R.S.B.C. 1996, c. 410. The plaintiffs rely on section 4 of the ***Food and Drugs Act,*** R.S.C. 1985, c. F-27 with respect to the issue of standard of care.

[32] The defendant argues, correctly, that any contract based claims, including the ***Sale of Goods Act*** claims, can only belong to someone who actually purchased items from Capers. An individual who only consumed a food product originating from Capers (and purchased by someone else), or who only had contact with someone else who had consumed a food product, has no claim in contract. They say there is no clear pleading in the case of Ms. Fakhri that she actually purchased the items from Capers that she consumed and which made her sick.

[33] In the case of the proposed immunized class, including Mr. Aylon, Capers submits that the allegations in the statement of claim do not state material facts disclosing a reasonable cause of action against it.

[34] The defendant argues that the plaintiffs are seeking to have a class certified based on food products "that were *or might have been* tainted with the Hepatitis A virus". The group of individuals who have been confirmed as having HAV is small (eight, seven of whom have already settled their claims).

[35] The overwhelming majority, by far, of the persons whom the plaintiffs propose to have included in this proceeding are persons who did not become ill at all and who may never actually have been exposed to HAV. The defendant's position is that this case does not meet the requirements for certification with respect to that large group as claims based on allegations about food products that *might have been tainted* do not state any reasonable claim, either in negligence or in contract. Such allegations cannot provide any foundation for common issues that might properly be certified.

[36] In order to establish negligence a plaintiff must prove the basic elements, i.e. duty, breach of duty and damages. The defendant argues that to be successful in this action the plaintiffs must show that they suffered injury arising from the food products. ***Gee v. White Spot Limited*** (1986), 7 B.C.L.R. (2d) 235 (S.C.).

[37] However, I am of the view that it is not plain and obvious the plaintiffs' argument that, even if there was no injury, the food products posed a substantial danger to the public and therefore fall within a known exception to the general rule that damages for pure economic loss are not recoverable in tort, will fail. ***Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.***, [1995] 1 S.C.R. 85.

[38] Although the defendant agrees that the plaintiffs did not have to consume the food product and wait to get ill, it says the plaintiffs will be unable to establish the food was tainted because it was either thrown away or returned. It is the defendant's position that s. 4 of the ***Food and Drugs Act*** does not apply as pleading and proof of a defect; i.e., the material facts supporting a conclusion that one (or more) of the warranties implied under the ***Sale of Goods Act*** has been breached, are necessary in order to sustain a claim based on breach of warranties. In this case, Capers says there is simply no evidence that the food was defective.

[39] I agree with the plaintiffs that it is not plain and obvious that food which either had to be disposed of, returned to Capers for disposal or, if it had been consumed, the

individual had to have an ISG injection, is not defective within the meaning of the ***Sale of Goods Act***.

[40] The defendant relies on ***M. Hasegawa & Co. v. Pepsi Bottling Group (Canada) Co.*** (2002), 1 B.C.L.R. (4th) 209 (C.A.) for the proposition that it owes no duty with respect to food that only might be defective. The defendant says that absent an allegation that every item of food was contaminated, or an allegation that every item of food posed a real and substantial danger to human health, no cause of action has been stated.

[41] ***Hasegawa*** was a claim for pure economic loss and the trial judge found that the evidence at trial fell well short of proving the mould in the water was capable of doing harm to humans, whether predisposed to illness or not. The most telling evidence that the bottled water was not dangerous was that the plaintiff attempted to sell it elsewhere. The Court of Appeal held that the trial judge did not err in that finding (¶ 49 and 50). I would note that is very different from the evidence in this case where the proposed class members were told to dispose of or return any unconsumed food to Capers and that if they had consumed the food to get an ISG injection.

[42] The defendant says the plaintiffs have not pled that the food products posed a danger to the public. The statement of claim is to be read generously to accommodate drafting deficiencies. The test is not predicated on the assumption that the pleadings may not be amended. ***Kimpton v. Canada (Attorney General)*** (2002), 9 B.C.L.R. (4th) 139, at ¶ 8 and 9.

[43] The defendant also argues that is plain and obvious there is no causal connection between any acts of the defendant and the claims of the proposed immunized class members because it was the announcement by the Health Authority that an infected individual had worked in the Commissary which resulted in the need for the class members to obtain the ISG injection. However, this argument ignores the allegations of negligence on the part of Capers in failing to institute appropriate food handling protocol, employee monitoring, employee training and employee vaccinations. I accept that the plaintiffs might have a cause of action based on their theory that the defendant was negligent in failing to ensure proper food handling protocols were in place, failing to properly educate its staff regarding food handling, failing to monitor its staff and failing to vaccinate its staff.

[44] I find the defendant's arguments premature as they address the merits of the claim. There has been no document

exchange to date and there is no evidence of what, if any, tests Capers did on the food that was returned or that it removed from the shelves voluntarily or the appropriate standard of care.

[45] Finally, the defendant argues that the proposed immunized class will be unable to show damages or loss; i.e. that an essential element of a tort is missing, or that any damages or loss they will be able to show will be trivial and should not form the basis of an action. However, there is no evidence before me that the immunized class suffered no damages. On the contrary, Mr. Aylon had to shut down his business for the day to line up to get the shot and then suffered an adverse reaction to it.

[46] As well, the plaintiffs claim damages for anxiety. The defendant argues that no such claim is recognized in law. However, the plaintiffs have referred to the case of ***Anderson v. Wilson*** (1999), 44 O.R. (3d) 673, 175 D.L.R. (4th) 409 (Ont. C.A.) which was an action involving the identification of a possible link between an outbreak of Hepatitis B and clinics where the defendants provided electroencephalogram tests (EEGs). Health authorities notified over 18,000 patients by letter that they should be tested. The plaintiffs brought a proposed class proceeding and claimed in negligence and for

breach of contract. Their motion for certification was granted and the certification order was upheld but amended by the Divisional Court, which removed from the class of plaintiffs a group who did not contract the disease, but who were informed of the possibility and who were tested.

[47] In setting aside the order of the Divisional Court the Court of Appeal stated that the Divisional Court was wrong to exclude the group of person who received notice of the possibility of infection, were tested and were uninfected. Given the uncertain state of the law on tort relief for nervous shock, it was not appropriate for the Court to reach a conclusion at the certification stage without a complete factual foundation. On the assumption that a legal obligation existed, this segment of the class was ideally suited for certification as there were many people with the same complaint, each of whom would represent a modest claim that would not justify an independent action. (¶ 17 - 18)

[48] Although the defendant argues that anxiety is different from nervous shock and not recognized, the plaintiffs submit that anxiety is the same as nervous shock. It would be inappropriate to determine this matter at this early stage as it is not plain and obvious that the plaintiffs' claim in this regard will fail.

[49] Accordingly, I find that the pleadings disclose a cause of action.

Section 4(1)(b) – An Identifiable Class

[50] Membership in the class is capable of objective determination. The class proposed for certification in these proceedings consists of a class that will be comprised of all persons who:

- claim to have been infected with HAV in the months of February, March or April 2002 as a result of handling and/or consuming the Tainted Food Products, or having contact with a person who was infected with HAV as a result of handling and/or consuming the Tainted Food Products; and

- in the months of March or April 2002, received anti-Hepatitis A injections because of handling and/or consuming the Tainted Food Products, or having contact with a person who was or might have been infected with HAV as a result of handling and/or consuming the Tainted Food Products.

[51] As stated earlier, there are eight individuals who were confirmed by the Health Authorities as infected with HAV

as a result of handling or consuming the food products and 6,447 individuals who received ISG injections.

[52] The group of 6,447 who received the ISG injections are ideally suited to be a class as there are many persons with the same complaint, each of whom would typically have a modest claim that would not in itself justify an action. They are clearly identifiable based on objective criteria. ***Western Canadian Shopping Centres Inc. v. Dutton***, [2001] 2 S.C.R. 534, ¶ 38.

[53] Although the defendant argues that it has settled with seven of the eight individuals who were identified as having contracted HAV and, therefore, there is no longer a class, Ms. Fakhri who allegedly experienced some symptoms and was tested weakly reactive to HAV is not included in the group. In my view, it is inappropriate to exclude individuals who contracted HAV or were weakly reactive for Hepatitis A from the class.

[54] The requirement to show that the class is defined sufficient narrowly is not an onerous one. Not everyone in the class has to share the same interest in the resolution of the common issue; however, the class should not be unnecessarily broad. ***Hollick***, ¶ 20 and 21.

[55] In this case, I find that there are objective criteria to satisfy the requirement of defining a sufficiently narrow class. If subsequent to certification, differences among class members become material, they can be dealt with either through sub-classes or as individual issues. ***Scott v. TD Waterhouse Investor Services (Canada) Inc.*** (2001), 94 B.C.L.R. (3d) 320 (S.C.), ¶ 73.

Section 4(1)(c) - Common Issues

[56] This inquiry is limited to whether common issues of fact or law exist. It is not an exercise, at this stage, of weighing the common issues against individual issues. ***Class Proceedings Act***, s. 4(1)(c); ***Lumley,*** ¶ 33; ***Harrington v. Dow Corning Corp.*** (2000), 82 B.C.L.R. (3d) 1, (C.A.), ¶ 23.

[57] The touchstone to this inquiry is whether proceeding as a class action will avoid either duplication of fact-finding or legal analysis. The questions which should be asked to determine whether issues are common are:

- Is the resolution of the issue necessary to the resolution of each class members' claim? And
- Is the issue a substantial ingredient of each of the class members' claims? ***Hollick***, ¶ 18.

[58] This latter requirement has been stated by the British Columbia Court of Appeal as being satisfied if the resolution of a common issue, either for or against the class members, will advance the case; i.e. move the litigation forward, and is capable of extrapolation to all class members. It is not necessary that the resolution of the common issues be determinative of liability. ***Harrington v. Dow Corning Corp.***, at ¶ 20-24.

[59] The common issues should be disclosed by pleadings, including particulars. However, common issues may be refined and reduced as litigation proceeds. ***Hoy v. Medtronic, Inc.*** (2001), 94 B.C.L.R. (3d) 169 (S.C.), aff'd (2003) 14 B.C.L.R. (4th) 32, 2003 BCCA 316, at ¶ 49.

[60] The courts have addressed whether certain types of claims and relief raise common issues and have held as follows:

- claims sounding in negligence raise common issues because no class member can prevail without showing duty and breach; and

- punitive damages are appropriately certified as common issues because the focus of the inquiry into the award is on the conduct of the defendant.

Rumley, ¶ 27-32 and 34; ***Chace v. Crane Canada Inc.*** (1996), 44 B.C.L.R. (3d) 264 (C.A.) ¶ 23 -27; ***Endean v. Canadian Red Cross Society et al.***, ¶ 40-41.

[61] The proposed common questions are:

(a) Did Capers have a duty to class members to ensure that its food products were safe and reasonably fit for their intended purpose, being human consumption?

(b) Was Capers negligent in the production, manufacture, distribution, or sale of the food products that were or might have been contaminated with HAV?

(c) Did Capers breach an implied warranty to class members who purchased its food products that those food products were safe and reasonably fit for their intended purpose, being human consumption?

(d) Did Capers breach a statutory warranty to class members who purchased its food products, pursuant to the ***Sale of Goods Act*** and the ***Food and Drugs Act***?

(e) Should punitive and exemplary damages be awarded against Capers and if so, in what amount?

[62] I agree with the plaintiffs that the resolution of the negligence common issues are necessary to the resolution

of each class member's claim; i.e. each must be able to prove that the defendant owed a duty of care, the nature of the duty of care and whether it was breached. These issues are primary issues in each proposed class member's claim for negligence and therefore a decision on them will, in my view, advance the litigation.

[63] There is a rational connection between the class as defined and the proposed negligence common issues based on the definition of the proposed class. All are concerned with whether Capers met the standard of care for food handling. If the plaintiffs establish at the common issues trial that the negligent handling of food products posed a substantial danger to the public that will advance the case of each class member.

[64] If the defendant is right that the plaintiffs' theories have no merit then it will resolve the claims being asserted. The time for the determination of whether Capers owed a duty to the class members and breached that duty is the trial of the common issues. No individual member of the class is likely to have personal knowledge of these duties and breaches, so individual participation in the resolution of these issues is unnecessary.

[65] The defendant's submissions that there is no causal connection between the class members getting the injection and

any negligence on the part of Capers will be considered in the context of whether the plaintiffs' theories regarding improper food handling, improper employee education, improper employee monitoring and that employees should have been vaccinated are correct. The issue of whether there is a causal connection between negligence on the part of Capers and the plaintiffs' claims for damages is at the heart of this litigation.

[66] The defendant argues that proposed common issue (a) is not a matter in issue as the defendant has admitted that it owed a duty to take reasonable care that food products it manufactured were safe, free from contaminants and reasonably fit for human consumption (statement of defence, paragraph 3(a)). Both parties agree that common issue (a) should be: What duty was owed by Capers in the production, manufacture, distribution or sale of food products and to whom was the duty owed?

[67] The defendant's position on the proposed common questions (c) and (d) is that they only apply to persons who bought food from Capers and, therefore, are not appropriate common questions. I am of the view that the proposed common issues in (c) and (d) meet the test of eliminating duplication of fact finding and legal analysis. I agree with the defendant that although the questions are common to many of

the proposed class members they are not common to those who did not purchase food products from Capers. The practical solution to deal with these common issues is to subdivide the proposed class members into those who had a contractual relationship with Capers and those that did not.

[68] I agree with the plaintiffs that, in order to determine whether the defendant was in breach of contractual or statutory warranties, the key factual issues will be same as those relating to the negligence issue, i.e. any causal connection between the food handling protocols or employee training, monitoring and vaccinations and damages suffered by the plaintiffs.

[69] Once the issue of whether Capers breached an implied warranty that the food products were safe and reasonably fit for human consumption, or a statutory warranty pursuant to the ***Sale of Goods Act*** and the ***Food and Drugs Act***, the determination of whether the defendant was in breach to a particular class member will be a simple factual matter at the individual issues stage.

[70] Accordingly, I conclude that proposed question (b) and (a), as reworded, are common issues in the class proceeding. Questions (c) and (d) are common issues with

respect to those class members who purchased food products from Capers.

[71] Proposed common question (e) deals with whether punitive and exemplary damages should be awarded against Capers. Punitive damages have been accepted by the courts as an appropriate common issue in many cases because the focus of the inquiry is on the conduct of the defendant. ***Rumley***, ¶ 34.

[72] The defendant's submissions regarding the common issue of punitive damages relate to the merits and are premature at this stage.

[73] In my view, the appropriateness and amount of punitive damages is a question which is amenable to resolution as a common issue in this case.

Representative Plaintiff – Section 4(1)(e)

[74] Section 4(1)(e) of the ***Class Proceedings Act*** mandates that the representative plaintiff must be able to fairly and adequately represent the class, has developed a plan for proceeding and does not have a conflict with the interests of the class on common issues. The representative plaintiff must be prepared to vigorously represent the interests of the class. ***Campbell v. Flexwatt Corp.*** (1997), 44 B.C.L.R. (3d) 343 (C.A.) at ¶ 75.

[75] The inquiry about whether the representative plaintiff adequately and appropriately represents class members and potential conflicts of interest is focused on the proposed common issues. If differences between the representative plaintiff and the proposed class do not impact on the common issues then they do not affect the representative plaintiff's ability to adequately and fairly represent the class, nor do they create a conflict of interest. ***Hoy v. Medtronic,*** ¶ 83-85; ***Endean v. Canadian Red Cross Society*** (1997), 36 B.C.L.R. (3d) 350 (S.C.) at ¶ 66.

[76] There is no indication that Mr. Aylon has any interest in conflict with the class members on the proposed common issues. If such a conflict were to arise, sub-classes are available to deal with differences. See, for example, ***Anderson v. Wilson*** at 24; ***Endean v. Canadian Red Cross Society*** (SC) at ¶ 66; ***Hoy v. Medtronic,*** at ¶ 83-85.

[77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the

certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members. ***Hoy v. Medtronic,*** at ¶ 81-82; ***Scott v. TD Waterhouse Investor Services***, ¶ 164-167.

[78] In my view, the proposed litigation plan sufficiently addresses the requisite issues and demonstrates that the plaintiffs and class counsel have thought through the process of the proceeding.

[79] I conclude that the plaintiffs' theory of the case does permit Mr. Aylon to represent all class members. I do not accept the defendant's submission that Mr. Aylon cannot represent persons who became ill as, in my view, the common issues are the same for both those who became ill and those who did not become ill but received an injection.

[80] Those class members who wish to control their own actions or develop special theories inconsistent with the theory being advanced by the plaintiff in this action remain free to do so after opting-out of the class proceedings.

Section 4(1)(d) - Preferability

[81] The test for whether the class action is the preferable procedure for the resolution of the common issues is set out in s. 4(2) of the ***Class Proceedings Act.***

[82] The list of factors to consider is not exhaustive and no single factor trumps. ***Elms v. Laurentian Bank of Canada***, ¶ 51.

[83] The extent to which the proposed proceeding will achieve the goals of the ***Class Proceedings Act,*** namely, access to justice, judicial efficiency and behaviour modification, should be considered in the preferability assessment along with the considerations mandated by s. 4(2). ***Hollick,*** ¶ 32 – 34; ***Elms v. Laurentian Bank of Canada***, ¶ 54-55; ***Endean v. Canadian Red Cross Society***, (S.C.), ¶ 23, 53-64.

Section 4(2)(a) – Common Questions Predominate

[84] There are usually individual issues of injury and causation that have to be determined in individual proceedings following the resolution of the common issues.

[85] Where the common issues are at "the heart of the litigation", as they are here, concerns about the relative

weight of individual issues are much less troubling. ***Scott v. TD Waterhous****e*, ¶ 117. 120-122, 130-137.

[86] Cases have been certified even where the court determined that the individual issues predominated over the common issues. In ***Endean v. Canadian Red Cross Society,*** (S.C.) the Court recognized this as follows:

> In my view, the intention behind these provisions of the ***Act*** is to put more emphasis on the goal of access to justice than on that of judicial economy. That was the approach taken in ***Harrington***, *supra*, where a class proceeding was certified despite the many unresolved, difficult, individual issues associated with establishing claims arising out of allegedly defective breast implants. Accordingly, the undoubted predominance of individual issues here is not in itself fatal to the application.
>
> (¶ 74)

[87] I agree with the plaintiff that the common issues which have been enunciated, i.e. the negligence of the defendant and/or the breach of warranties regarding the fitness of the food products and any causal connection with the damages being claimed by the plaintiffs, are at the heart of this litigation. Resolution of the common issues will either conclude the litigation in favour of the defendant or leave very little for individual consideration in the event that the common issues are decided in favour of the class. The key remaining individual issues will be:

- whether the class member purchased food products from Capers;

- whether the class member did not purchase but came into contact with either food or persons who had contact with the food products; and

- what damages, if any, has the class member suffered as a result of the food products?

[88] The issues are clearly capable of resolution and the fact that damages require individual assessment is not a bar to certification.

[89] Section 7 of the ***Class Proceedings Act*** deals with individual issues. The presence of individual issues does not make individual litigation preferable to class litigation. The same issues will be faced in both litigation structures. The ***Class Proceedings Act*** is not directed solely to the resolution of the common issues, but also to the simplification and management of any individual issues that remain. These simplification and management tools are incorporated into the plaintiff's case management plan. ***Class Proceedings Act***, section 27; ***Endean v. Canadian Red Cross Society***, (S.C.) ¶ 60.

[90] Although the defendants have argued that "individual" issues predominate, the material adduced in support of their position provides some indication of the commonality of the issues. All the material deals with the HAV outbreak and food safety issues, the same issues the plaintiffs say are common.

Section 4(2)(b) - Class Members Do Not Have An Interest In Controlling Separate Actions

[91] There is no evidence that any class members wish to control separate actions.

Section 4(2)(c) - Claims That Are or Have Been the Subject of Other Proceedings

[92] There is no evidence of other B.C. proceedings pertaining to this problem. As such, there is no evidence that class members are able to sustain individual claims, or that the issues will be addressed in some other litigation.

Section 4(2)(d) - Other Means of Resolving the Claims

[93] There is no evidence of alternative methods for resolving these claims or of other forums where a class member can pursue his or her claim. Accordingly individual litigation is the only alternative.

[94] Individual litigation affords no advantage over a class proceeding in this case. A class proceeding provides a number of benefits which enhance its preferability. I find it is likely that a determination of the common issues will permit the individual issues to proceed more efficiently and expeditiously. As well, depending on the outcome, the determination of the common issues may encourage settlement. A class proceeding in the circumstances of this case allows access to justice for those who would not otherwise have the means to prosecute an action. The common issues will be determined and simplified structures and procedures can be implemented for the individual issues if appropriate. To require each individual to separately address the common issues identified rather than have them determined in a class proceeding would, in my view, lead to inefficient use of resources and the potential for inconsistent decisions.

Section 4(2)(e) - The Administration of this Class Proceeding

[95] There is no indication that this class proceeding will create any undue administrative difficulties. There is only one defendant, no suggestion of any third parties and the individual issues appear to be few and resolvable.

[96] The administration of this class proceeding will not present greater difficulties than those likely to be

experienced if relief were sought by other means. All of the same issues would need to be considered in any individual litigation, but in a less controlled procedural environment.

CONCLUSION

[97] In this case, the claims of the individual plaintiffs are not economically feasible on their own. The issues are complicated and it is not practical for an individual plaintiff to litigate a case without the assistance of counsel. The costs of retaining experts will easily outstrip any one class member's claim.

[98] The gains from a class action are self-evident with respect to judicial economy and efficiency. The duty, standard of care, breach of standard of care, breach of contract and ***Sale of Goods Act*** issues will only be heard once by this court.

[99] Judicial economy will also be enhanced because the class members do not need to participate in the initial discovery process or the common issues trial. If the defendant is successful at the common issues trial, the court and the class will be saved from having to manage and participate in such individual procedures. If the plaintiffs are successful, any procedures necessary to resolve the

individual litigation will be no more complex than they would have been within individual litigation and, given the many management tools available in class proceedings, should be simpler.

[100] With respect to behaviour modification, Chief Justice McLachlin noted in ***Western Canadian Shopping Centres Inc. v. Dutton***:

> Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation...
>
> (¶ 29)

[101] Food producers who distribute products which fall below acceptable standards should, if they are negligent, account to their customers for resulting damage.

[102] The class as defined and the proposed common issues meet the touchstone of the analysis enunciated in ***Western Canada Shopping Centres v. Dutton*** and ***Hollick,*** i.e. they will enable the court to avoid duplication in fact finding and legal analysis. In my view the common issues identified are at the heart of this litigation and will advance the litigation.

[103] As well, certification is appropriate in order to achieve access to justice. Given the relative simplicity of the individual issues and the tools available under the ***Class Proceedings Act***, I have concluded that a class proceeding is the preferable proceeding for the fair and efficient resolution of these claims.

[104] Accordingly, I am granting the following orders:

- the action is certified as a class proceeding;
- the class is described as persons who:
    - claim to have been infected with Hepatitis A in the months of February, March or April, 2002 as a result of handling and/or consuming food products produced, manufactured, distributed and/or sold by the defendant that were tainted with the Hepatitis A virus, or having contact with a person who was infected with Hepatitis A as a result of handling and/or consuming the tainted food products (the "Infected Class");
    - in the months of March or April, 2002, received anti-Hepatitis A injections after handling and/or consuming food products produced, manufactured,

distributed and/or sold by the defendant that were or might have been tainted with the Hepatitis A virus, or having contact with a person who was or might have been infected with Hepatitis A as a result of handling and/or consuming the defendant's food products (the "Immunized Class").

- the plaintiff Ady Aylon be appointed representative plaintiff;

- the questions as modified are certified as common issues of fact or law.

[105] I am making no orders regarding notice requirements or opting out provisions as those matters were adjourned generally.

"L.B. Gerow, J."
The Honourable Madam Justice L.B. Gerow