Court Of Appeal File No. CA031450

COURT OF APPEAL

ON APPEAL FROM: Supreme Court of British Columbia, Vancouver Registry No. L023298,
Order of Madam Justice Gerow pronounced November 17, 2003

BETWEEN:

HELEN FAKHRI and ADY AYLON
as representative Plaintiffs

RESPONDENTS
(Plaintiffs)

AND:

WILD OATS MARKETS CANADA, INC.
Carrying on business as
CAPERS COMMUNITY MARKETS

APPELLANT
(Defendant)

APPELLANT'S FACTUM

Name of Appellant:

WILD OATS MARKETS CANADA, INC.
carrying on business as
CAPERS COMMUNITY MARKETS

Counsel for the Appellant:

Elaine J. Adair
Warren B. Milman
McCarthy Tétrault LLP
Barristers and Solicitors
PO Box 10424, Suite 1300
777 Dunsmuir Street
Vancouver, British Columbia
V7Y 1K2

Name of Respondents:

HELEN FAKHRI and ADY AYLON
as representative Plaintiffs

Counsel for the Respondents:

David Klein
Klein, Lyons
Barristers and Solicitors
Suite 1100
1333 West Broadway
Vancouver, B.C.
V6H 4C1

Court Of Appeal File No. CA031450

COURT OF APPEAL

ON APPEAL FROM: Supreme Court of British Columbia, Vancouver Registry No. L023298,
Order of Madam Justice Gerow pronounced November 17, 2003

BETWEEN:

HELEN FAKHRI and ADY AYLON
as representative Plaintiffs

RESPONDENTS
(Plaintiffs)

AND:

WILD OATS MARKETS CANADA, INC.
Carrying on business as
CAPERS COMMUNITY MARKETS

APPELLANT
(Defendant)

APPELLANT'S FACTUM

Name of Appellant:

WILD OATS MARKETS CANADA, INC.
carrying on business as
CAPERS COMMUNITY MARKETS

Counsel for the Appellant:
Elaine J. Adair
Warren B. Milman
McCarthy Tétrault LLP
Barristers and Solicitors
PO Box 10424, Suite 1300
777 Dunsmuir Street
Vancouver, British Columbia
V7Y 1K2

Name of Respondents:

HELEN FAKHRI and ADY AYLON
as representative Plaintiffs

Counsel for the Respondents:

David Klein
Klein, Lyons
Barristers and Solicitors
Suite 1100
1333 West Broadway
Vancouver, B.C.
V6H 4C1

INDEX

CHRONOLOGY

Date	Event
March 16, 2002	The Plaintiff Ady Aylon "purchased and consumed potato salad, hummus and a variety of juices" from Capers.
March 18, 2002	Last day worked by the food handler later identified by the Vancouver Coastal Health Authority ("VCHA") as having tested positive for the Hepatitis A virus ("HAV").
March 26, 2002	VCHA advises Capers that the food handler formerly employed by Capers had tested positive for HAV. Working with the VCHA, Capers produces a list of food products with which the infected former employee may have had contact in the period beginning March 4, 2002.
March 27, 2002	Capers removes from its stores' shelves and discards all products on the list. The VCHA issues a news release advising anyone who consumed any of the listed products to get a shot of immune serum globulin ("ISG"), which must be given within 14 days of exposure to be effective.
March 29, 2002	The Plaintiff Ady Aylon receives an ISG shot and later attends Vancouver General Hospital emergency ward after experiencing "muscle stiffness, flushing, headache, weakness and nausea." He is told he was probably experiencing a reaction to the ISG shot, and is sent home.
March 29 – April 1 and April 8 - 9, 2002	6,447 individuals receive ISG shots at VCHA clinics.
April 9, 2002	VCHA expands product advisory to include muffins, hummus and black olive tapenade.
April – May, 2002	The VCHA identifies eight individuals as having become ill with Hepatitis A, associated with Capers.
October 23, 2002	The Plaintiff Helen Fakhri files the Writ of Summons.
November 12, 2002	Mr. Aylon is added as a plaintiff.
November 27, 2002	The Plaintiffs file the Statement of Claim.
March 11, 2003	The Defendant files its Statement of Defence.
October 20, 21 and 25, 2003	Hearing of certification application.
November 17, 2003	Reasons released granting certification.
February 2, 2004	The Plaintiffs amend their Statement of Claim.

OPENING STATEMENT

This is an appeal from an order certifying this action as a class proceeding under s. 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c.50 (the "*Class Proceedings Act*").

On March 27, 2002 the Vancouver Coastal Health Authority (the "VCHA") made a public announcement that it had identified a case of Hepatitis A in a food handler who had been employed at Capers Community Markets (the name under which the Defendant ("Capers") carries on business). The VCHA recommended that anyone who had eaten any of the foods with which food handler might have had contact should seek an injection of immune serum globulin ("ISG"). According to the VCHA, between March 29 and April 9, 2002, 6,447 people received ISG injections at various public clinics in and around the Lower Mainland. The VCHA ultimately concluded that a total of eight individuals (not including the Plaintiff Helen Fakhri) had actually become ill with HAV. As of October 21, 2003, Capers had settled with seven of those.

In this action, claims in negligence and in contract are asserted on behalf of two distinct groups: individuals who claim to have become ill with HAV, and those who did not become ill but received a shot of ISG or a vaccination. The learned Chambers Judge certified common issues concerning what duty was owed by Capers in the production, manufacture, distribution or sale of food products, whether Capers was negligent in the production, manufacture, distribution or sale of food products that were *or might have been* contaminated with HAV, and whether punitive and exemplary damages should be awarded against Capers, among other issues.

In Capers' submission, the order of the learned Chambers Judge was based on three errors.

First, the learned Chambers Judge failed to appreciate that, on the facts, the inclusion of claims respecting food products that might have been contaminated and of persons, such as the Plaintiff Mr. Aylon, who did not become ill with HAV and who received a shot of ISG or a vaccination, raised complex issues of causation, proof of actionable harm and damages that could only be resolved on an individual basis. Instead, the learned Chambers Judge approached the certification application as if this case was indistinguishable from one in which the class was limited to individuals who claimed to have become ill with HAV after consuming food produced

by Capers that was contaminated. The error of the learned Chambers Judge is illustrated by her references to causation as being at the "heart" of the litigation. It led her to conclude, mistakenly, that a class proceeding was preferable to resolve (on the Plaintiffs' theories) the equivalent of over 6,000 individual lawsuits in circumstances where there are serious questions about whether individual claimants would be able to prove any actionable harm at all.

Secondly, assuming the criteria for certification were otherwise satisfied, the learned Chambers Judge nevertheless erred in certifying "punitive and exemplary damages" as a common issue. Based on the substantive law as pronounced by the Supreme Court of Canada, and in view of the learned Chambers Judge's conclusion that compensatory damages were individual, not common, issues, punitive damages could not be a common issue in this case.

Thirdly, and again assuming the criteria for certification were otherwise satisfied, the learned Chambers Judge accepted a class definition that was too broad. By refusing to exclude those individuals who had fully and finally settled their claims with Capers, the learned Chambers Judge included as class members persons who could not possibly have claims. Doing so is contrary to the objects of judicial economy, access to justice and behaviour modification.

PART I. STATEMENT OF FACTS

1. This is an appeal from an order certifying as a class proceeding an action brought by the Plaintiffs Helen Fakhri and Ady Aylon, on their own behalf and on behalf of all Class members, claiming damages for injuries, loss, inconvenience, anxiety, anguish, mental suffering, nervous shock and incidental expenses arising out of the production, distribution and/or sale of food products that were or might have been contaminated with the Hepatitis A virus ("HAV").[1]

A. Events in the Spring, 2002

2. On March 26, 2002, the Vancouver Coastal Health Authority (the "VCHA") notified Capers that an individual who had been employed by Capers as a food handler (the "Employee") has been diagnosed with HAV, and had been infectious while working in Capers' kitchen. Immediately, Capers sought advice from the VCHA, who directed Capers to assemble a list of food products that the Employee had either handled or prepared in the period beginning March 4, 2002, and to recall all products on that list. Capers followed these directions, and removed from its stores' shelves and destroyed all food products on the product list.[2]

3. HAV is a virus that infects the liver. The incubation period is approximately 15 - 50 days. Patients who become infected with HAV are themselves infectious for up to two weeks prior to the onset of any symptoms. Consequently, infected patients may transmit HAV before

---

[1] Amended Statement of Claim, paras. 3-7, 52, **Appeal Record ("AR"), pp. 17-18, 28.**

[2] Reasons for Judgment, para. 10 **AR p. 45**; Affidavit of Deborah Ouellet ("Ouellet Affidavit"), paras. 7-16, **Appeal Book ("AB") pp. 118-121.**

any diagnosis is made. Unlike Hepatitis B and C, HAV never leads to "chronic hepatitis", which is a much more serious condition.[3]

4. Immune Serum Globulin ("ISG") is given to treat HAV, and can prevent illness after exposure. However, ISG must be given within two weeks of exposure to be effective. It has no benefit and is not effective if given later than fourteen days following exposure. Its protection lasts four to six months. Only about 1% of recipients experience any adverse reaction from ISG. Adverse reactions normally run their course within one day of the injection.[4]

5. On March 27, 2002, the VCHA issued a news release (one in a series) entitled "Hepatitis A Alert – Capers Community Markets." This news release stated, among other things, that the VCHA had identified a case of HAV in a Capers food handler, and that consumption of certain food items sold at the three Capers locations could have exposed members of the public to HAV. The release contained a brief description of HAV, and set out recommendations for members of the public who had purchased or consumed "affected food items." These recommendations included that members of the public receive an ISG injection.[5]

6. On April 9, 2002, the VCHA issued a news release expanding the list of potentially affected products to include hummus, muffins and black olive tapenade" based on information from new confirmed cases. Capers was told by the VCHA that it did not have to take any steps to recall hummus, muffins and black olive tapenade because it was too late as of

---

[3] Affidavit of Dr. Frank Anderson, paras. 5, 10, **AB pp. 130, 131**; Reasons for Judgment, paras. 13-14, **AR pp. 46**.

[4] Anderson Affidavit, paras. 11-14, **AB pp. 131-132**; Reasons for Judgment, para. 17, **AR p. 47**.

[5] Affidavit of Kurstin Leith No. 1 ("Leith No. 1"), Exhibit "B", **AB pp. 13-14**; Reasons for Judgment, para. 11, **AR p. 45**.

April 9, 2002 for individuals who had consumed any of them during the material time to benefit from an injection of ISG.[6]

7. The VCHA identified eight individuals associated with Capers who became ill with HAV.[7] Ms. Fakhri was not among the eight.[8] According to the VCHA, 6,447 persons in British Columbia were reported to have received ISG injections.[9]

8. As of the date of the hearing of the Plaintiffs' certification application, seven of the eight individuals identified by the VCHA as having become ill with HAV had settled their claims against Capers, including giving a full and final release.[10] The state of the evidence concerning the number of class members was, therefore, that there was a group of approximately 6,400 persons who did not become ill but within 2 weeks of March 26, 2002 received a shot, and a group of two (including Ms. Fakhri) who claimed to have become ill with HAV. Together, these groups formed the class.

B. The Plaintiffs

9. Helen Fakhri claims that in the months of February and March, 2002, she ate numerous food items she had purchased at Capers, including salads, salad dressings and muffins. She claims that in "March and April, 2002" she began to suffer from "fever, chills, nausea, and fatigue," and after being told by her husband on April 8, 2002 about the "outbreak" at Capers,

---

[6] Reasons for Judgment, paras. 18-20, **AR p. 48**; Ouellet Affidavit, para. 26, **AB p. 123**.
[7] Reasons for Judgment, para. 21, **AR p. 48**.
[8] Ouellet Affidavit, para. 27, **AB p. 123**.
[9] Leith No. 1, para. 36, **AB p. 11**; Ouellet Affidavit para. 27, **AB p. 123**.
[10] Kurstin Leith Affidavit No. 2, paras. 2-4 and Exhibit "A", **AB pp. 148-150, 152-154**; Kurstin Leith Affidavit No. 3, paras. 6-7, **AB pp. 247-248**.

she went to a walk-in clinic. Ms. Fakhri claims she was told by a clinic physician that her blood samples tested positive for HAV,[11] although the allegation made on her behalf is that she was "reactive to HAV."[12]

10. In the light of the information from the VCHA, which contradicts Ms. Fakhri's claims, there will clearly be individual issues specific to Ms. Fakhri concerning whether in fact she was infected with HAV at all at the relevant time, and if so, whether her infection had any connection with Capers.

11. Mr. Aylon does not claim to have become ill with HAV. Rather, he claims that he closed his flower shop and went to get a shot of ISG. He went first to the VCHA clinic on Denman Street, where there was a long line, and then went to the clinic in North Vancouver, where he waited about 4 hours before getting his injection.[13] Mr. Aylon claims to have suffered certain side effects from the ISG.[14]

C. The Claims and the Defences

12. The Statement of Claim pleads a cause of action in negligence, a cause of action based on breach of both implied conditions and warranties under the *Sale of Goods Act*, and a

---

[11] Affidavit of Helen Fakhri, paras. 2-3, **AB pp. 161-162.**

[12] Statement of Claim, para. 33, **AR p. 8.**

[13] Affidavit of Ady Aylon No. 2 ("Aylon No. 2"), para. 3. **AB p. 234.** Based on the chronology in Mr. Aylon's initial affidavit ("Aylon No. 1"), which corresponded to the allegations in the Statement of Claim, it appeared he had received an injection of ISG at a time when it would not have been effective. Since he did not contract HAV, it therefore appeared Mr. Aylon had no claim at all. A fuller chronology, and clarification, was provided in Aylon No. 2.

[14] Aylon No. 1, paras. 7-9, **AB pp. 157-158**; Aylon No. 2, para. 4, **AB p. 234**; Reasons for Judgment, paras. 23-24, **AR p. 49.**

separate cause of action based on the alleged existence of "contracts of sale" containing "implied conditions and warranties."[15]

13. The Plaintiffs allege that, "as a result of Capers' negligence, breach of contractual warranties and breach of statutory duties," they and the alleged class members "have suffered injury, loss, and damages."[16] A long list of particulars (20 items) are pleaded.[17] The Plaintiffs claim damages for "injuries, loss, inconvenience, anxiety, and incidental expenses," and since the Order under Appeal was granted, the Plaintiffs have amended the Claim to allege that they also suffered "anguish, distress, mental suffering, nervous shock."[18] Among other relief, the plaintiffs claim punitive damages, although (improperly) no facts have been pleaded and no particulars provided to support this claim.[19]

14. The Plaintiffs have amended the Statement of Claim to allege specifically that the "Tainted Products" posed a "real and substantial danger to human health."[20]

15. In its Statement of Defence, Capers admits that it owed a duty to take reasonable care that food products manufactured and sold by it were safe, free from contamination and reasonably fit for human consumption, and that it was subject to the standard of care applicable

---

[15] Statement of Claim, paras. 42-49, **AR pp. 10-11**.

[16] Statement of Claim, para. 50, **AR p. 11**.

[17] Statement of Claim, para. 51, **AR pp. 11-13**. An additional particular is pleaded in the Amended Statement of Claim, para. 51(a.1), **AR p. 27**.

[18] Amended Statement of Claim, para. 52, **AR p. 28**.

[19] Statement of Claim, para. 53, **AR p. 13**. This remains the case in the Amended Statement of Claim.

[20] Amended Statement of Claim, para. 44, **AR p. 25**. The "Tainted Products" are food products that "were or might have been tainted with the Hepatitis A virus and were produced, manufactured, distributed and/or sold" by Capers (Statement of Claim, para. 3, **AR p. 3**; Amended Statement of Claim, para. 3, **AR p. 17**). The amendments may have been prompted by submissions during the certification hearing that no reasonable claim has been stated: see Reasons for Judgment, paras. 35-37, **AR pp. 54-55**.

to manufacturers of products that are ingested or consumed by individuals. Capers pleads that it complied with its duties.[21]

16. Among other things, Capers denies that any alleged infection with HAV was caused by any negligence or breach of contract on its part, denies in respect of the so-called "Immunized Group" including Mr. Aylon, that any individuals in that group have suffered any loss or damage, and denies that if any individual has suffered any alleged loss or damage that it was the result of any negligence or breach of contract on the part of Capers.[22] Capers has also pleaded contributory negligence as a defence.[23]

D. The Certification Order and Reasons for Judgment

17. On November 17, 2003, the Learned Chambers Judge granted the Plaintiffs' application to have this action certified as a class proceeding.

18. The class (the "Class") was defined as: all persons who (a) 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, manufactured, distributed and/or sold by Capers that were tainted with the Hepatitis A virus (the "Tainted Food Products"), or having contact with a person who was infected with Hepatitis A as a result of handling and/or consuming the Tainted Food Products; and (b) in the months of March or April, 2002, received either an injection of Immune Serum Globulin or Hepatitis A vaccine after handling and/or consuming food products produced, manufactured, distributed and/or sold by Capers that were or might have been tainted with the

[21] Statement of Defence, para. 3, **AR pp. 31-32.**
[22] Statement of Defence, paras. 5-6, **AR pp. 32-34.**
[23] Statement of Defence, para. 6. **AR p. 33-34.**

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.[24]

19. In addition to the Class, a purchaser sub-class (the "Purchaser Sub-class"), namely those persons who purchased food, was certified.[25] A non-resident subclass was also certified,[26] although no evidence had been tendered to support its existence. Mr. Aylon was appointed the representative plaintiff for the Class and the Purchaser Sub-class.[27] Despite the clear statement in s. 6 of the *Class Proceedings Act* that the court must not certify a proceeding involving sub-classes unless certain requirements are met, there was no representative plaintiff appointed for the non-resident sub-class, and no litigation plan was produced, or required to be produced, for the Purchaser Sub-class.

20. The common issues certified in respect of the Class were: (a) what duty was owed by Capers in the production, manufacture, distribution or sale of food products and to whom was the duty owed; (b) was Capers negligent in the production, manufacture, distribution or sale of the food products that were or might have been contaminated with Hepatitis A virus? and (c) should punitive and exemplary damages be awarded against Capers and if so, in what amount.[28]

21. The common issues certified in respect of the Purchaser Sub-Class were: (a) did Capers breach an implied warranty to class members who purchased food products that those

[24] Certification Order, para. 2, **AR pp. 37-38**.
[25] Certification Order, para. 3, **AR p. 38**; Reasons for Judgment, para. 67, **AR pp. 66-67**.
[26] Certification Order, para. 5, **AR p. 38**.
[27] Certification Order, para. 7, **AR p. 39**.
[28] Certification Order, para. 8, **AR p. 39**.

products were safe and reasonably fit for their intended purpose, being human consumption? and (b) did Capers breach a statutory warranty to class members who purchased its food products, pursuant to the *Sale of Goods Act*, R.S.B.C. 1996, c. 410.[29]

22. On several occasions, the learned Chambers Judge expressed the view that causation was a key factual issue and at the "heart" of the litigation.[30] For example, the Chambers Judge wrote at paragraph 87 (*italics* added):

> The common issues . . . 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?

23. Based on this view, the learned Chambers Judge concluded that a class proceeding was preferable and observed that "there is no indication that this class proceeding will create any undue administrative difficulties.[31] The learned Chambers Judge concluded (*italics* added): "The common issues identified are at the heart of this litigation and will advance the litigation. . . . *Given the relative simplicity* of the individual issues and the tools available

[29] Certification Order, para. 9, **AR pp. 39-40.**

[30] Reasons for Judgment, paras. 65, 68 and 87, **AR pp. 65-67, 72-73.**

[31] Reasons for Judgment, para. 95, **AR p. 75.**

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."[32]

[32] Reasons for Judgment, paras. 102-103 **AR pp. 77-78.**

PART II. ERRORS IN JUDGMENT

24. The certification order discloses three errors.

25. First, the conclusion of the learned Chambers Judge that a class proceeding was preferable, and that the Plaintiffs had satisfied s. 4(1)(d) of the *Class Proceedings Act*, was based on the assumption that this was a case in which causation and actual harm could, and would, be proved on a class-wide basis, and that the case was indistinguishable from one in which all class members claim to have been infected with HAV. There was no support for that assumption, and accordingly, no support for the conclusion of the learned Chambers Judge.

26. Second, the learned Chambers Judge certified punitive damages as a common issue. Based on the substantive law, in particular as set out by the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595("*Whiten*") and *Performance Industries and others v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678("*Performance Industries*"), and on the facts of this case, this was clearly wrong, assuming the criteria for certification were otherwise satisfied.

27. Third, in refusing to exclude from the class definition persons who had settled their claims against Capers, the learned Chambers Judge accepted a class definition that was too broad, again assuming the criteria for certification were otherwise satisfied.

PART III. ARGUMENT

A. Overview

28. Capers accepts that, on an application for certification, the chambers judge has a broad discretion in determining whether the criteria of s. 4 of the *Class Proceedings Act* have been met. An appellate court ought not to interfere with the exercise of this discretion unless persuaded that the chambers judge erred in principle or was clearly wrong: *Hoy v. Medtronic, Inc.* (2003), 14 B.C.L.R. (4th) 32 (C.A.), 2003 BCCA 316 ("*Hoy*"), at para. 38. Capers submits that in this case, the learned Chambers Judge erred in principle in relation to whether a class proceeding was preferable, based on her misapprehension of the case before her. In addition, even if the requirements of s. 4 of the *Class Proceedings Act* were otherwise satisfied, Capers submits that the learned Chambers Judge was clearly wrong in certifying punitive damages and in failing to exclude from the Class those persons who, on the evidence, had fully and finally settled their claims.

29. The *Class Proceedings Act* is procedural only.[33] It does nothing to alter the parties' burden of proof or the substantive prerequisites to recovery, whether based in tort, contract, or any other substantive legal basis, including recovery of punitive damages. The result is that, in addition to pleading a proper claim, all of the elements that entitle a claimant to relief based on the substantive law relevant to the cause or causes of action alleged eventually must be proved before a claimant's case is fully adjudicated. This is a key aspect of what Chief Justice McLachlin described in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158; 2001 SCC 68 ("*Hollick*")

[33] *Harrington* v. *Dow Corning Corp.* (2000), 82 B.C.L.R. (3d) 1 (C.A.), 2000 BCCA. 605 ("*Harrington*"), para. 78; *Scott v. TD Waterhouse Investor Services (Canada) Inc.* (2000), 83 B.C.L.R. (3d) 365 (S.C.), 2000 BCSC 1786, para. 41; *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Div. Ct.), p. 542 (paras. 18-19).

as looking at the common issues in their context,[34] and of the comment of Judge Smith in *Castano v. American Tobacco Co.*, 84 F.3d 734 (U.S. 5th Cir., 1996) ("*Castano*") that going beyond the pleadings is necessary, as a court must understand the claims, defences, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.[35] Chief Justice McLachlin also cautioned that the question of whether an action should be permitted to be prosecuted as a class action is necessarily one that turns on the facts of the case.[36]

30. In addition to *Hollick*, a useful illustration of the importance of having due regard to substantive requirements when considering whether or not certification should be granted is provided in the judicial history of *Chadha v. Bayer Inc.* (1999), 45 O.R. (3d) 29 (S.C.J.), reversed (2001), 54 O.R. (3d) 520 (Div.Ct.), aff'd (2003), 63 O.R. (3d) 22 (C.A.). At first instance, Sharpe J. (as he then was) certified a case involving an alleged price-fixing conspiracy, framing the common issue in terms of whether the defendants were liable to the plaintiffs for conspiracy to fix the price of iron oxide, and if so, what is the appropriate measure of damages. The Ontario Divisional Court reversed the certification order, and that judgment was affirmed by the Ontario Court of Appeal. The higher courts recognized that damage, an essential element of liability that must be proved for each class member, could not (based on the evidentiary record presented on the motion) be proved on a class-wide basis but would have to be proved

[34] *Hollick*, paras. 28-32.
[35] *Castano*, p. 744. See the reference to *Castano* in *Harrington*, at para. 38.
[36] *Hollick*, para. 37.

individually for each claimant.[37] In that light, the case was completely unmanageable as a class proceeding.

31. Recently, Chief Justice Finch observed in *Hoy*, at para. 54 (*italics* added):

> A number of the authorities speak of a "cost/benefit" analysis in the context of the preferability question. . . . The analysis, rather, involves an assessment of whether a class proceeding *would advance the claims in any meaningful way. If resolution of the common issues goes a considerable measure towards obtaining relief for the plaintiffs*, then the benefit of proceeding by way of class action, as opposed to individual actions, is a factor in favour of certification. Certification, in such circumstances, would advance the objects of judicial economy and improved access to the courts.

32. In both *Hollick* and *Hoy* (to mention but two examples), the courts recognized that unless resolution of common issues will advance litigation in a legally material way, the goals of judicial economy and access to justice will very likely be frustrated. Judicial economy is not enhanced if common issues are negligible in relation to individual issues because (assuming, as the Plaintiffs hypothesize here, there are thousands of claimants) the court will be left in any event, *and despite certification*, with many issues to be tried and determined individually. The thousands of claimants hypothesized by the Plaintiffs would quickly overwhelm scarce judicial resources,[38] risking depriving non-class-action litigants of "access to justice." Access to justice for class members will also not be enhanced by a class proceeding because class members will still be left having to bear the expense of litigating significant issues – for example, in this case, causation and damage in the form of economic losses or nervous shock – individually.

---

[37] See *Chadha*, 54 O.R. (3d) 520, at paras. 18-24, 36-38, and 63 O.R. (3d) 22 at paras. 24, 55-56.

[38] In his recent judgment in *Caputo v. Imperial Tobacco Co.*, [2004] O.J. No. 299 (S.C.J.), Mr. Justice Winkler gives a memorable example of the potential for a class action to completely paralyse judicial resources: see para. 72 of the judgment.

33. Very recently, the Ontario Divisional Court affirmed the judgment of Nordheimer J. in *Pearson v. Inco Limited and others*, [2002] O.J. No. 2764 (S.C.J.), aff'd [2004] O.J. No. 317 (Div. Ct.) ("*Pearson Appeal*") refusing certification in an action alleging Inco had remitted toxic substances into the environment, causing damage to the health of proposed class members and damage to their lands, homes and businesses. On the appeal, the plaintiffs abandoned claims relating to health impairment or risk of health impairment.[39] The Divisional Court noted (at para. 6) that it was not in issue that the Inco emissions contaminated the environment, but there remained issues of causation of alleged harm (among other issues). The court noted further (at para. 21) (*italics* added):

> Nordheimer J. found that answers to the common issues would be of no more than theoretical interest until the particular factual circumstances of each individual claimant were examined. He noted that before liability could be imposed on Inco for any claim, *a causal link between the alleged harm and Inco's conduct would have to be established.*

34. Counsel for the appellant-plaintiffs argued that the proposed common issues could be redrafted to take into account that claims were now limited to real property damage, and argued that determining those issues in favour of the class would establish both causation and liability for the entire class.[40] The Divisional Court rejected these arguments, saying:

> Appellant/Plaintiff has not put forward any methodology appropriate in the circumstances to establish loss on a class wide basis. It is not open to the Appellant/Plaintiff on a certification motion to presume findings on causation with resulting liability.

---

[39] *Pearson Appeal*, paras. 3, 9.

[40] *Pearson Appeal*, para. 32.

> As Nordheimer J. found, and we agree, courts must not "certify now and worry later."[41]

35. In this case, the learned Chambers Judge based her conclusion that a class proceeding was preferable on the assumption that "causation", which she saw as at the heart of the litigation, would be resolved through the trial of the common issues. On the contrary, the common issues certified by the learned Chambers Judge would do nothing to determine causation issues. On the facts of this case, and in the light of the substantive prerequisites to recovery, those issues, and others, would have to be determined on a case-by-case basis. There was no evidence they would or could be resolved any other way. This should have been fatal to certification.

B. The conclusion of the learned Chambers Judge that a class proceeding was preferable was based on an erroneous assumption

36. The conclusion of the learned Chambers Judge that a class proceeding was preferable was based on her assumption that this was a case in which causation and actual harm could, and would, be proved on a class-wide basis, and that this case was indistinguishable from [illegible] in which all class members claim to have been infected with HAV from food that was in fact contaminated. There was no support for this assumption. Based on the facts before the learned Chambers Judge, her conclusion that causation was "at the heart" of the litigation should have resulted in certification being refused. That it led the learned Chambers Judge to the opposite conclusion shows that the learned Chambers Judge failed properly to consider the nature and substantive prerequisites of the claims in fact being advanced on behalf of the vast majority of the class members in this case.

---

[41] *Pearson Appeal*, para. 34.

37. In some cases, such as *Chace v. Crane Canada Inc.* (1998), 44 B.C.L.R. (3d) 264 (C.A.) affirming (1997), 26 B.C.L.R. (3d) 339 (S.C.) ("*Chace*") or *Dalhuisen v. Maxim's Bakery Ltd.*, [2002] B.C.J. No. 729 (S.C.), 2002 BCSC 528 ("*Dalhuisen*"), the "harm" (a flooded house in the former case, becoming ill from salmonella in the latter) may be susceptible of straightforward proof. Proof of damage is, of course, necessary to make out a complete cause of action in negligence.[42]

38. Had the class members in this case been limited to those persons who became ill with HAV, this case may have provided a closer parallel to the type of case illustrated by *Chace*, or *Dalhuisen*, or *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 (S.C.) ("*Endean*").[43] On the evidence, had the class been limited to those persons, this case still would not have been appropriate for certification in view of the very small number of such claimants: joinder would clearly have been a more reasonable alternative in view of the individual issues that inevitably would have to be litigated.

39. However, for all those claimants (in the thousands) who did not become ill with HAV, actionable damage (if there is any at all) appears to be comprised principally of economic losses and anxiety or "nervous shock." Whether any such harm was suffered, whether anyone claims (like Mr. Aylon) to have suffered other harm such as a reaction to the ISG shot, and whether any alleged harm was caused by any fault of Capers are matters that will not be resolved by a trial of the common issues certified. They can only be resolved by individual trials. "Anxiety" or "nervous shock" claims require (among other things) proof of a recognized

[42] see, e.g., *Pfeifer v. Morrison* (1973), 42 D.L.R. (3d) 314 (B.C.S.C.).

[43] Note the discussion of the class definition in *Endean* at paras. 29-31, and the concession made by plaintiffs' counsel. The class size was estimated at between 300 and 3,000.

psychiatric illness as a condition for liability.[44] The common issues certified will not determine anything with respect to such a claim, nor could the claim be proved on a class-wide basis. Moreover, it is clear from the common issues certified by the learned Chambers Judge that causation is not a matter that will determined by a trial of the common issues, and the Plaintiffs did not suggest it could be. The result is that proof of damage as an element of liability and proof of causation, both complex issues, will have to be determined as individual, not common, issues.

40. The learned Chambers Judge's approach to this case was that it was essentially indistinguishable on the relevant points from *Dalhuisen*, a case involving food alleged to be contaminated with salmonella and in which the class was limited to those persons who became ill. As a result, the learned Chambers Judge concluded, mistakenly, that the requirements for certification had been met, when, looking at the case as a whole, and in particular the claims of the persons who were not infected with HAV who make up the vast majority of the Class, it was not appropriate for class treatment. Resolution of the common issues in favour of the plaintiffs would do little to advance claims in any meaningful way, in view of what would be left to be proved (according to the usual burden of proof) before any claimant would obtain relief.[45]

41. For those persons – numbering in the thousands – who did not become ill with HAV, the "injuries" (apart from the allegations of nervous shock) alleged to be suffered have

---

[44] see *Devji v. Burnaby (District)* (1999), 70 B.C.L.R. (3d) 42 (C.A.), 1999 BCCA 599 and *Graham v. MacMillan* (2003), 10 B.C.L.R. (4th) 397 (C.A.), 2003 BCCA 90, at para. 8.

[45] *Hoy*, para. 54. Even purchase of a particular food item would have to be proved, as the learned Chambers Judge recognized. For those basing claims on "having contact with" someone who "might have been infected," at least 2 witnesses would be required: the claimant, and the person with whom the claimant had contact. Capers would have the right to conduct an examination of each person to determine whether there is any basis for a claim.

been left for pure speculation, unlike the class members in *Dalhuisen* or *Endean*, but nevertheless would have to be proved before a claimant would be entitled to any relief. A class proceeding would do nothing for persons who claimed to have suffered economic losses only, or suffered "nervous shock," since each such claim would have to be proved individually.[46] There is no good reason for the court to speculate in the Plaintiffs' favour that *anyone* who did not become sick with HAV would pursue a claim or consider it worthwhile to do so, regardless of certification. That some complaints are simply not worthy of adjudication at all, and that reasonable members of the public recognize this, is on the facts of this case at least as plausible an explanation for the complete absence of any individual litigation by anyone who did not become ill as any hypothesis advanced by the Plaintiffs. The objects of "judicial economy" and "access to justice" are not enhanced by manufacturing thousands of claims that would otherwise not exist.

42. In terms of the substantive elements to be proved, the claims advanced by almost all of the class members in this case are quite different from the claims advanced in *Dalhuisen* or *Endean*, since they are based on a theory of legal liability in negligence from food products that *might have been* contaminated. However, food that "might have been contaminated" cannot cause illness from HAV. In this case, actionable harm or damage could only be proved on an individual basis, as illustrated by Mr. Aylon himself.[47] Unlike examples such as *Chace* or *Endean* or *Dalhuisen*, such proof is not straightforward in this case.

---

[46] See the comments of Groberman J. in *Nelson v. Hoops L.P. and others*, [2003] B.C.J. No. 382 (S.C.), 2003 BCSC 277, paras. 42-43, 47.

[47] Reasons for Judgment, para. 45, **AR p. 58**. The "harm" Mr. Aylon alleges he suffered consists principally (although apparently not exclusively) of economic losses (from shutting down his flower shop) and personal injury in the form of a reaction to the shot of ISG, on the evidence a rare event.

43. Contrary to the erroneous assumption of the learned Chambers Judge, causation will not be addressed as a common issue. The common issues that were certified pertain only to the question of the duty that was owed by Capers and whether it was breached. No provision has been made for an examination during the trial of the common issues of the causation issues that are supposedly at the "heart" of the case, and the learned Chambers Judge does not attempt to explain in what manner the "many management tools" available in class proceedings might be applied.[48] Causation will only be addressed in the context of (on the Plaintiffs' hypothesis) 6,447 individual trials.

44. The observations of the learned Chambers Judge concerning the significance of the common issues in the context of the claims as a whole, in particular her observations in paragraphs 85-87 of her Reasons for Judgment, reflect a fundamental misconception about the nature of claims advanced in this case. Describing issues as being "at the heart" of a case is not a substitute for analysis of whether in fact such issues are only the beginning of a long inquiry (as was the case in *Hollick*), or whether they are issues that (as Chief Justice Finch described in *Hoy*), when resolved, go a considerable measure toward obtaining relief for the plaintiffs.

45. Apart from the very small number of persons who became ill with HAV, investigation of whether Capers generally engaged in negligent food handling practices would not necessarily advance any class member's claim in any significant measure. As McLachlin J. (as she then was) observed in *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, at p. 964 (para. 49):

> [A]n essential element of tortious liability is lacking in the absence of loss. As Lord Diplock stated in *Browning v. War Office*, [1962]

[48] Reasons for Judgment, paras. 99, 103, **AR pp. 76-77, 78.**

> 3 All E.R. 1089, at pp. 1094-95: "A person who acts without reasonable care does no wrong in law; he commits no tort. He only does wrong, he only commits a tort, if his lack of care causes damage to the plaintiff."

46. For those persons who in fact became ill with HAV, the determination of the common issue concerning the standard of care would, of course, have a clear focus and could be relatively straightforward.[49] For the rest however, staging the equivalent of an ill-defined "commission of inquiry" into every potentially negligent act in which Capers may have engaged will, at best, provide answers that can be of no more than theoretical interest until the particular factual circumstances of an individual claimant are examined to determine whether any lack of care on Capers' part caused actionable damage to that claimant.[50] In addition, without a causal link between the alleged harm (which will have to be proved for each individual claimant) and the actions of Capers, there will be no basis for liability. Accordingly, an issue at the "heart" of this litigation is whether Capers engaged in negligent acts that in fact caused actionable harm to any of the members of the Class. This is an issue that will not be determined in the trial of the common issues, but will have to be determined individually for each class member, even *assuming* that the Plaintiffs could prove examples where Capers had fallen below the standard of care. Since proof of damage is essential to establish a complete cause of action in tort, and since the damage alleged in this case cannot be proved on a class-wide basis, there can be no liability imposed without (on the Plaintiffs' theory) thousands of individual trials. Assuming the common issues were determined in the Plaintiffs' and class members' favour, even if very severely stream-lined so that the entire adjudication of a claimant's claim could be done in 30

---

[49] As noted above (paras. 7-8), the state of the evidence was that this group consisted of only two persons, including Ms. Fakhri. As Capers submitted (para. 38 above), joinder would clearly have been a more reasonable alternative for this pair, rather than class litigation.

[50] *Pearson Appeal*, paras. 21 and 34.

minutes, the individual trials could occupy the equivalent of approximately 700 court days. If Mr. Aylon is at all typical, adjudication of an average claim could take a day. If there were 6,000 such cases, it would take a judge (sitting 5 days per week, 50 weeks per year) the equivalent of 24 years to adjudicate all of the claims, assuming a prior determination of common issues in the class members' favour.

47. Rather than addressing "the heart of the litigation," the trial of the principal common issues will be, instead, a trial of Capers' alleged negligence in the abstract. That is to say, that it will be an inquiry (presumably) into the numerous negligent acts and omissions alleged in the Statement of Claim,[51] without regard for their connection, if any, to any harm alleged to have been sustained by almost all of the more than 6,000 class members. Any such harm, and what caused it, will have to be proved individually.

48. The result is that there was no proper foundation for the conclusion of the learned Chambers Judge concerning what could and would be resolved through a trial of the common issues. If causation was truly "at the heart of" this litigation, certification ought to have been refused based on the facts and the substantive law. Looking at the common issues in the context of the claims as a whole, and in particular considering the elements that, based on the substantive law applicable to the causes of action alleged, would have to be proved to establish Capers' liability in negligence to class members who did not become ill with HAV, a class proceeding is not preferable. Judicial economy will not be enhanced by flooding the courts with the equivalent of over 6,000 individual claims, and access to justice will not be enhanced because (assuming common issues are determined in the class members' favour) claimants will still be left to bear

[51] Statement of Claim, para. 51, **AR pp. 11-13.**

the expense of litigating significant individual issues such as causation and the nervous shock claims.

C. The learned Chambers Judge was clearly wrong in certifying a common issue concerning punitive damages

49. The learned Chambers Judge certified as a common issue "Should punitive and exemplary damages be awarded against Capers and if so, in what amount?"[52] (the "Punitive Damages Issue"). "Punitive" and "exemplary" damages are not in law two different types of damage,[53] and use of both terms in the expression of an issue simply creates an unhelpful ambiguity.

50. Based on the conclusion of the learned Chambers Judge that damages was an individual issue,[54] and applying the applicable principles as set out in *Whiten* and *Performance Industries*, the Punitive Damages Issue could not be a common issue in this case.

51. In *Whiten* and *Performance Industries*, Binnie J. (for the Court) clarified that questions concerning whether punitive damages are appropriate at all, and if so in what amount, can only be addressed after a finding of liability and an assessment of compensatory damages. While it is quite correct (as the learned Chambers Judge observed[55]) that in considering punitive damages the focus of the inquiry is on the conduct of the defendant, Mr. Justice Binnie has clarified that the conduct of the defendant is not the only relevant factor that a court must address

---

[52] Certification Order, para. 8(c), **AR p. 39**; Reasons for Judgment, paras. 71-72, **AR p. 68**.

[53] *Imperial Oil Ltd. v. Lubrizol Corp.* (1996), 67 C.P.C. (3d) 1 (F.C.A.) ("*Imperial Oil*"), p. 18.

[54] Reasons for Judgment, para. 87, **AR pp. 72-73**.

[55] Reasons for Judgment, para. 71, **AR p. 68**, citing *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69, para. 34.

in making a determination whether punitive damages should be awarded, and if so, in what amount.[56]

52. It therefore follows that, in cases where liability and compensatory damages are individual, not common, issues, such as in this case, certification of punitive damages as a common issue changes the substantive law relating to punitive damages, which is not permitted, and is contrary to Supreme Court of Canada authority.

53. In this case, the certification of the Punitive Damages Issue violates Supreme Court of Canada authority by:

(a) assuming that liability to pay punitive damages can be determined without, and in advance of, a determination of liability for compensatory damages; and

(b) eliminating the required assessment of the rationality and proportionality of punitive damages in relation to the compensatory damages awarded.[57]

54. Determination of the first two common issues certified in respect of the Class will not determine that Capers is liable to anyone for any compensatory damages. Based on the principles set out in *Whiten* and *Performance Industries*, an award of compensatory damages must be a pre-requisite to any consideration of punitive damages. Without this prior assessment of compensatory damages, which the learned Chambers Judge concluded (correctly) would be done as part of an individual claimant's claim,[58] it is impossible to determine whether punitive

[56] *Whiten*, paras. 43, 67-76, 94 and 129; *Performance Industries*, para. 87. See also *Imperial Oil*, pp. 20, 22.
[57] See *Whiten*, paras. 67, 71, 74, 94, 101 and 129 and *Performance Industries*, paras. 82 and 87.
[58] Reasons for Judgment, para. 87, **AR p. 73.**

damages serve any rational purpose. The result is that, even assuming the criteria for certification were otherwise met in this case, the Punitive Damages Issue cannot be a common issue, and the learned Chambers Judge was clearly wrong in certifying it.

D. The learned Chambers Judge was clearly wrong in failing to exclude from the Class persons who had settled their claims

55. The learned Chambers Judge refused to define the Class so as to exclude persons who, on the evidence, had settled their claims against Capers.[59] A clear precedent for defining a class in this way is found in *Chace*.[60]

56. No useful purpose is served by defining a class to include persons who have no interest in resolution of the common issues because they have fully and finally settled their claims. The class as defined was, clearly, unnecessarily broad. There is no rational relationship between persons who have settled claims and given a full and final release, and the common issues. If certification was otherwise appropriate, the learned Chambers Judge should either refused to order it, or allowed certification on the condition that the class definition be amended.[61]

---

[59] Supplementary Reasons for Judgment, para. 3, Supplemental Appeal Record ("**SAR**") **p. 2.**

[60] See *Chace*, para. 2.

[61] *Hollick*, paras. 20-21.

PART IV. – NATURE OF ORDER SOUGHT

57. Capers seeks an order that the order under appeal be set aside and the certification application be either dismissed, or alternatively, be remitted to the Court below for disposition in accordance with this Honourable Court's Reasons for Judgment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Counsel for the Appellant

Dated this 10th day of March, 2004.

LIST OF AUTHORITIES

Cases

Statutes