Court of Appeal File No. CA031450

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

COURT OF APPEAL

BETWEEN:

HELEN FAKHRI and ADY AYLON

Respondents
(Plaintiffs)

AND:

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

Appellant
(Defendant)

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

RESPONDENT'S FACTUM

Name of Appellant:

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

Name of Respondent:

ADY AYLON
as Representative Plaintiff

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CHRONOLOGY

Date	Event
1999	British Columbia Medical Officers recommend that all food handlers in the province should be vaccinated against hepatitis A to protect the public from potential exposure to the virus through food products. Capers does not vaccinate its food handlers until after the 2002 hepatitis A outbreak.
February/March 2002	Food handler at Capers Kitsilano location ("First Infected Worker") is handling baked good while infectious for hepatitis A. First Infected Worker contaminates baked goods which infect food handler at Capers commissary ("Second Infected Worker") and several Capers patrons.
March 16, 2002	The plaintiff, Ady Aylon purchases and consumes implicated food products from Capers.
March 2002	The plaintiff, Helen Fakhri purchases and consumes implicated food products from Capers.
March 18, 2002	Second Infected Worker has onset of symptoms of hepatitis A and stops working. Second Infected Worker was infectious for 2 weeks prior to onset of symptoms.
March 26, 2002	Vancouver Coastal Health Authority ("Health Authority") receives notification of a food handler who tested positive for hepatitis A (the Second Infected Worker) and begins investigation. The Health Authority learns that the Second Infected Worker had failed to consistently wear gloves during food preparation and that food items prepared by the Second Infected Worker were still on the shelves at all 3 Capers locations.
March 26, 2002	Health Authority orders immediate removal of any potentially contaminated food items from all Capers outlets, offers immune serum globulin ("ISG") and hepatitis A vaccine to all co-workers of Second Infected Worker, and provides education to Capers workers on hygiene and on signs and symptoms of hepatitis A.
March 27, 2002	Health Authority issues press release advising Capers patrons to discard implicated food products and to obtain ISG injection if implicated food products had been consumed within the prior 14 days. Over the ensuing weeks, the list of implicated food products is expanded and new press releases are issued.
March 27 –April 9	Health Authority opens clinics in Vancouver and West Vancouver to administer ISG injections to Capers patrons. 6,447 individuals receive ISG injections at the clinics.

March 29, 2002	Mr. Aylon closes his business and attends clinic for ISG injection. He suffers adverse reaction and attends at Vancouver General Hospital.
April 2002	Mrs. Fakhri has blood tests and is informed that she has contracted hepatitis A.
April-May, 2002	Health Authority identifies 8 persons as infected with hepatitis A as a result of the Capers outbreak. Another two Capers patrons are identified as testing "weakly reactive" to hepatitis A.
Post March 2002	Capers vaccinates its food-handlers for hepatitis A.
October 22, 2002	Mrs. Fakhri files Writ of Summons.
November 12, 2002	Mr. Aylon is added as a plaintiff.
November 27, 2002	Plaintiffs file Statement of Claim
March 11, 2003	Defendant files Statement of Defence
October 20, 21 and 25, 2003	Hearing of certification application.
November 17, 2003	Decision certifying action as class proceeding
February 2, 2004	Plaintiffs file Amended Statement of Claim.

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OPENING STATEMENT

Hepatitis A is a communicable disease that is transmitted through faecal-oral transmission. Faecal-oral transmission means that the virus is spread from person to person by putting something in the mouth that has been contaminated with the feces of a person with hepatitis A. By failing to wash his or her hands adequately after a bowel movement, a hepatitis A carrier can spread the virus to food in the preparation and serving process. The most important measures for preventing the spread of hepatitis A are promoting good personal hygiene and proper food handling practices. Hepatitis A infection can also be prevented by inoculation with a hepatitis A vaccine prior to infection. In 1999, the British Columbia Medical Officers recommended that all food handlers in the province should be vaccinated against hepatitis A to protect the public from potential exposure to the virus through food products.

On March 26, 2002, the Vancouver Coastal Health Authority discovered that a food handler employed by Capers had been diagnosed with hepatitis A, that he had been contagious while working at Capers, that he had failed to wear protective gloves while preparing food for sale to the public, and that the food products he prepared were still for sale at Capers' stores. Further investigation by the Health Authority revealed that a second Capers food handler had been infectious for hepatitis A and had contaminated baked goods that were sold to the public.

A public health alert was issued. At least 8 Capers customers contracted hepatitis A from exposure to Capers food products. Another 6,447 people reasonably believed that they were at risk of contracting hepatitis A from Capers food products, and lined up for vaccinations at emergency clinics set up across the city. The vaccinations also carry certain risks and some individuals suffered adverse side effects from the injections.

The plaintiffs allege that this public health emergency never would have happened, but for the negligence of Capers and its employees. Capers vaccinated its employees *after* the outbreak. Had Capers ensured that its food handlers were vaccinated against hepatitis A, offered adequate training on hygiene and food handling to its workers, and provided the appropriate facilities for safe food handling, the risk to public health would have been avoided. If the two

infected Capers workers had followed proper hygiene and food handling protocols, no one else would have been infected and thousands of Capers customers would have been spared the inconvenience, anxiety and expense of attending one of the emergency clinics for an inoculation.

Madam Justice Gerow correctly certified this action as a class proceeding, recognizing that the Appellant's alleged negligence and breach of the standard of care in its food-handling practices is an over-arching common issue for all class members. Whether the Appellant's conduct fell below a reasonable standard can be determined for the entire class at a single trial, either advancing the litigation, or disposing of it entirely, without the need for participation from individual class members. Madam Justice Gerow correctly recognized, as well, that the question of whether the sale of food that was contaminated or potentially contaminated with hepatitis A was a breach of implied or statutory warranty is central to the breach of warranty claim of every class member who purchased the implicated food products from the Appellant.

Madam Justice Gerow's decision is consistent with established class action jurisprudence. The Appellant fails to mention, let alone distinguish, the weight of caselaw directly on point, which supports certification.

On more than one occasion, this Court has stated that a chambers judge has a broad discretion in determining whether a proceeding meets the statutory criteria for certification. Determining whether a class proceeding would be preferable under s.4(1)(d) of the *Class Proceedings Act* is an important aspect of that discretionary power. An appellate court will not interfere with the exercise of this discretion unless persuaded that the chambers judge erred in principle or was clearly wrong. The Appellant's grounds for appeal fall far short of meeting this standard. The Appellant's complaint is really with the outcome of the certification motion, and not with the accepted legal principles applied by the learned Chambers Judge.

PART 1 – STATEMENT OF FACTS

1. For the most part, the Respondent accepts as accurate the statements of fact in the Appellants' factum. The additional facts that the Respondent considers relevant are set out below.

2. Hepatitis A is a serious contagious disease. The Vancouver Coastal Health Authority (the "Health Authority") describes it as follows:

> "Hepatitis A is a virus that infects the liver, resulting in fatigue, malaise, gastrointestinal symptoms and jaundice (yellow discolouration of the mucous membrane and skin). The severity of illness various from asymptomatic or very mild infections to severe infections that may last weeks or months. The death rate is 1/1,000 cases, but increases to 2% in persons over the age of 50 years. The death rate is also higher in persons who have other chronic liver disease."

Affidavit #3 of Ady Aylon, Exhibit A, Joint Appeal Book, p. 253

3. The infected food handler identified by the Health Authority on March 26, 2002 prepared various uncooked items for public consumption, such as sauces, dressings, sandwiches and salads that were then sold from the Appellant's three stores. The Health Authority's investigation into this worker states:

> "The food handler had onset symptoms on March 18 and stopped working that day. However, because cases of hepatitis A are infectious for 2 weeks prior to the onset of symptoms, the case had worked while infectious. The case had not consistently worn gloves during all food preparation activities, therefore there was the potential to contaminate food items. As the dressings/sauces/sandwiches/salads were not cooked items, the virus could have survived in these items and been consumed by the public. Although the case had stopped working on March 18, items prepared up until that date were still on the shelves of all 3 Capers locations as of March 26." (emphasis added)

Affidavit #3 of Ady Aylon, Exhibit A, Joint Appeal Book, pp. 253 – 254

4. Further investigation by the Health Authority revealed another infected food handler who worked at the Appellant's Kitsilano store. This infected food handler prepared muffins and other baked goods and was presumed to be the original source of the epidemic, infecting members of

the public and at least one co-worker.

Affidavit #3 of Ady Aylon, Exhibit A, Joint Appeal Book, p. 254

5. Hepatitis A is spread by faecal-oral transmission. An infected food handler may get the virus on his hands following a bowel movement and may then transmit the virus from his hands to food, and then to the public. The risk of transmission can be minimized through good hygiene and proper food handling techniques.

Affidavit #2 of Caleen Ross, para. 11-12 and Exhibits H, I & J, Joint Appeal Book, pp. 176, 177, 207-215

6. Infection with hepatitis A can be prevented by use of the hepatitis A vaccine. In 1999, the British Columbia Medical Officers recommended that all food handlers in the province should be vaccinated against hepatitis A to protect the public from potential exposure to the virus through food products. At the time of the outbreak in March 2002, the Appellant had not taken steps to ensure that its food handlers were vaccinated and did so only after the outbreak had occurred.

Affidavit #3 of Ady Aylon, Exhibit A, Joint Appeal Book, pp. 254 – 255
Affidavit #1 of Kurstin Leith, para. 30(a), Joint Appeal Book, p. 9

7. After the hepatitis A outbreak, the Health Authority administered the hepatitis A vaccine to the Appellant's staff. Hepatitis A vaccine is not normally provided free to food handlers (employers or employees have to pay for it) but, as a courtesy, the Health Authority provided the vaccinations free of charge in this instance.

Affidavit #3 of Ady Aylon, Exhibit A, Joint Appeal Book, p. 256

8. In 2002, the recommended treatment for someone exposed to hepatitis A, was to receive an injection of Immune Serum Globulin ("ISG"). As with any vaccine, drug, or injection of an immunizing agent, there is a possibility of a shock-like allergic reaction (anaphylaxis) from ISG. Symptoms include hives, wheezy breathing, or swelling of some part of the body. The inoculation can also have side effects that include soreness, redness, stiffness of muscles, and pain and tenderness around the injection site. Mild fever, flushing, headache, weakness, chills,

nausea, and/or just not feeling very well may also occur.

Affidavit #2 of Caleen Ross, Exhibit K, Joint Appeal Book, p. 217
Affidavit #1 of Dr. Frank Anderson, Exhibit B, Joint Appeal Book, pp. 145-146

9. The total of 6,447 people who were reported to have received ISG at public health units does not include Capers customers who may have received ISG in other provinces or outside Canada. Subsequent to the Capers outbreak, the provincial policy in B.C. was changed so that hepatitis A vaccine is now recommended for post-exposure prophylaxis for hepatitis A rather than ISG. Because research indicating the effectiveness of hepatitis A vaccine after exposure to hepatitis A was published in 1999, it is possible that some private physicians in British Columbia or elsewhere gave hepatitis A vaccinations to Capers customers.

Affidavit #3 of Ady Aylon, Exhibit A, Joint Appeal Book, p. 255

10. The Respondent alleges that the cause of this outbreak was the Appellant's negligence. While class certification is not an inquiry into the merits, and the Respondent has not yet had any discovery of the Appellant, the investigation conducted by the Health Authority suggests systemic problems with the Appellant's operations. The Appellant had not instituted the recommendations of the Medical Health Officers with respect to the vaccination of its food handlers. Not one, but two of its workers were infected. Not one, but two of its locations were involved. There was cross-infection between workers. One of the workers' was found not to have worn gloves when handling food. It appears, as well, that the other infected worker had failed to follow proper food handling protocols when handling baked goods thereby infecting members of the public. This was not a case of a single bad employee, but rather of inadequate training and hygiene systems at multiple locations run by the Appellant and a failure to follow the recommendations of the Medical Health Officers.

Affidavit #3 of Ady Aylon, Exhibit A, Joint Appeal Book, pp. 253 – 256

11. The Appellant erroneously states at paragraph 19 of its Factum that section 6 of the *Class Proceedings Act* mandates that a separate representative plaintiff is required for each sub-class. The *Class Proceedings Act* requires separate representative plaintiffs only where "in the opinion

of the court, the protection of the interests of the subclass members requires that they be separately represented." It is, in fact, quite common for the Court to certify subclasses but appoint a single representative plaintiff for the entire class.

> *Class Proceedings Act*, R.S.B.C. 1996, c.50, s. 6
> See *Pearson, Matus and Elliott v. Boliden Limited et al.*, 2001 BCSC 1054 at para 69-77

12. The Respondent has been clear from the outset that individual issues will remain following a successful common issues trial. This is frequently the case with class proceedings. The Respondent proposed, and the learned Chambers Judge accepted, a litigation plan which would resolve any remaining individual issues following a common issues trial, in a cost effective and efficient manner without creating undue administrative burdens on the judiciary.

> Affidavit #2 of Caleen Ross, Exhibit L, Joint Appeal Book, p. 219
> Reasons for Judgment, para. 74 and 95, Appeal Record, pp. 68 and 75, Tab 3

PART 2 – ISSUES ON APPEAL

13. The Appellant alleges three errors in the certification decision. The first is the learned Chambers Judge's finding that a class action is the preferable procedure for resolving this litigation. The Respondent's position is that the learned Chambers Judge was correct in holding that the common issues proposed by the Respondent are central to the claims of each class member. Further, the learned Chambers Judge correctly recognized that a class action is not just the preferable procedure for this litigation, but is the only viable procedure. Given the likely modest damages of many individual class members, individual litigation is not a feasible alternative. A class action is the only vehicle to accomplish the goal of making the Appellant fully accountable for the damage that its alleged wrongdoing has caused.

14. The Respondent's position is that the learned Chamber's Judge was correct in including a punitive damages common issue. The Respondent adopts the reasoning in *Chace* v. *Crane* (1997), 44 B.C.L.R. (3d) 32 (C.A.) where this Court stated that "a class proceeding seems particularly well-suited for the hearing of a claim for punitive damages" and in *Rumley* v. *British Columbia* (1999), 72 B.C.L.R. (3d) 1 (C.A.) where this Court held that "A global award [of punitive damages] can be assessed for the successful class members as a group, and allocated among them as the trial judge considers appropriate."

15. The Respondent's position is that the learned Chambers Judge was correct in holding that the question of whether a class member has "settled" his or her claim is an individual issue that should not form part of the class definition.

PART 3 – ARGUMENT

A. Standard of Review

16. Certification orders are discretionary and entitled to deference. This Honourable Court has set a high threshold for an appellant seeking to overturn a certification order. The appellant must show an error in principle or that the certification order is "clearly wrong". In dismissing an appeal of certification in *Hoy* v. *Medtronic*, Chief Justice Finch wrote:

> "In *Flexwatt, supra*, this Court recognized that a chambers judge has a broad discretion in determining whether a class proceeding meets the criteria of s. 4 of the Act. Determining whether a class proceeding would be preferable under s. 4(1)(d) is an important aspect of that discretionary power. 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 (2003), 14 B.C.L.R. (4th) 32, para. 38; 2003 BCCA 316
See also: *Campbell* v. *Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (C.A.)

17. The appeal in *Hoy* is similar to the appeal in this case. In *Hoy*, the appellant argued unsuccessfully that the chambers judge had failed to properly weigh the potential individual issues against the proposed common issues. This Honourable Court rejected those arguments, finding on the record that the Chambers Judge had weighed the individual and common issues, and that her practical assessment of the manageability of the case was entitled to deference.

Hoy v. *Medtronic* (2003), 14 B.C.L.R. (4th) 32, para. 49; 2003 BCCA 316

18. Caught by this high threshold for appeal, the Appellant argues that Madam Justice Gerow is guilty of a "misapprehension of the case before her" and that she certified the case based on "erroneous assumptions". There is no support for the Appellant's contention in the reasons of Madam Justice Gerow, just as there was no support for this argument in *Hoy*. As is clearly stated in her reasons, the learned Chambers Judge carefully weighed all of the relevant factors under the *Class Proceedings Act* and determined that the case should properly proceed as a class action. The Appellant says that the case is unmanageable, but Madam Justice Gerow has ruled otherwise, and she is best placed to make this practical assessment given her role as the

designated case management judge who will supervise this case until trial.

> Appellant's Factum, paras. 28 and 36
> Reasons for Judgment, Appeal Record, pp. 42 - 79, Tab 3

B. Preferable Procedure

19. Applying accepted legal principles, Madam Justice Gerow weighed all of the required factors under sections 4(1) and (2) of the *Class Proceedings Act* to determine that a class action is the preferable procedure. She found as a matter of fact that "there is no evidence that class members are able to sustain individual claims, or that the claims will be addressed in some other litigation." She also found that "[t]here is no evidence of alternative methods of resolving these claims."

> Reasons for Judgment, paras. 81-96, Appeal Record, pp. 71–76, Tab 3
> *Class Proceedings Act*, R.S.B.C. 1996, c.50, ss. 4(1) and (2)

20. The Appellant argues that the individual issues predominate in this case, but the learned Chambers Judge found otherwise, citing evidence filed by the Appellant as showing commonality. Madam Justice Gerow wrote:

> "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."

> Reasons for Judgment, para. 90, Appeal Record, p. 74, Tab 3
> Appellant's Factum, para. 46

21. The Appellant argues that class members must prove damages to prove negligence, and since damages are individual, there can be no common issues. The Appellant fails to appreciate the "but for" test, which is an integral aspect of the law of negligence. But for the negligence of the Appellant and its employees in failing to follow proper safety standards, the epidemic would never have occurred and no class member would have been injured or suffered any loss. This is

an issue that is common and that will advance the litigation for all class members. This breach of duty approach has been repeatedly certified by Canadian courts, and approved by the Courts of Appeal of British Columbia and Ontario and the Supreme Court of Canada.

> *Rumley* v. *British Columbia* (1999), 72 B.C.L.R. (3d) 1; 1999 BCCA 689; affirmed, [2001] 3 S.C.R. 184; 2001 SCC 69
> *Collete* v. *Great Pacific Management Co. Ltd.*, [2004] B.C.J. No. 381 (Q.L.) (B.C.C.A.); 2004 BCCA 110
> *Hoy* v. *Medtronic Inc.* (2003), 14 B.C.L.R. (4th) 32; 2003 BCCA 316
> *Dalhuisen* v. *Maxim's Bakery Ltd.*, [2002] B.C.J. No. 729 (Q.L.) (B.C.S.C.); 2002 BCSC 528
> *Anderson* v. *Wilson* (1999), 44 O.R. (3d) 673 (C.A.); leave to appeal to the Supreme Court denied.
> Appellant's Factum, para. 39

22. The Appellant argues that resolution of the individual issues in this case will tie up the services of a trial judge for years, imposing an intolerable burden on the judiciary. This is simply untrue and nothing short of fear-mongering. The Appellant completely ignores the Respondent's litigation plan. The plan proposes a simplified claims process for modest claims using referees and affidavits. The plan will not tie up judges. As Madam Justice Gerow found on the evidence before her, the administration of this action as a class proceeding will not impose an undue burden on the judiciary. She wrote:

> "In my view, the proposed litigation plan sufficiently addressees the requisite issues and demonstrates that the plaintiffs and class counsel have thought through the process of the proceeding....
>
> The administration of this class proceeding will not present greater difficulties that 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."
>
> Reasons for Judgment, paras. 78 and 90, Appeal Record, pp. 70 and 74, Tab 3
> Appellant's Factum, para. 46

23. The Appellant further ignores the weight of class action jurisprudence, directly on point, which shows that the claims asserted herein are manageable and have been repeatedly certified by Canadian courts. In *Anderson* v. *Wilson*, the Ontario Court of Appeal certified a class action with similar facts. In *Anderson*, a doctor negligently exposed 18,100 of his patients to risk of

infection with hepatitis. Health authorities contacted all of these patients for testing. Approximately 1,100 were found to be infected. The other 17,000 were uninfected, but claimed damages for nervous shock upon learning that they had been negligently exposed to this risk. The Ontario Divisional Court had ruled that these 17,000 uninfected persons did not have a cause of action and denied certification of this claim. The Ontario Court of Appeal disagreed, held that these uninfected persons did indeed have a cause of action, that their claims raised common issues, and certified the case.

> *Anderson* v. *Wilson* (1999), 44 O.R. (3d) 673 (C.A.); leave to appeal to the Supreme Court denied.
> Reasons for Judgment, paras. 46-8, Appeal Record, pp. 58 – 59, Tab 3

24. The *Anderson* case settled prior to the common issues trial. The Ontario court approved compensation of $1,000 per claimant for each of the uninfected persons who had been placed at risk of infection and had been required to go for medical testing.

> *Anderson* v. *Wilson*, Settlement Approval Order, Mackinnon J., Ontario Superior Court of Justice, January 2, 2002

25. Likewise, in *Rose* v. *Petal*, an Ontario court certified a class action against an acupuncturist who had negligently exposed her patients to the risk of a skin disease, mycobacterium abscessus. Health authorities contacted these patients and found that 32 had been infected and 295 were uninfected. A class action was certified for both the infected and uninfected patients. The Ontario court recognized the existence of individual issues, but nevertheless found that there were common issues that would advance the litigation.

> *Rose* v. *Pettle*, [2004] O.J. No. 739 (Q.L.) (O.S.C.J.)

26. Madam Justice Gerow relied on the Ontario Court of Appeal's decision in *Anderson*, and yet the Appellant fails to mention this case in its factum, let alone try to distinguish it. Instead, the Appellant tries to argue that the claims of uninfected class members in this case are "unworthy" of consideration, apparently because the damages claimed by individual class members are too small or insignificant. The Respondent submits that the damages claimed by class members may be modest, but they are not insignificant. Ms. Fakhri alleges infection with

hepatitis A. Mr. Aylon reasonably believed he had been placed at risk of infection with hepatitis A by the Appellant's products. To mitigate harm and at the recommendation of the Health Authority, he closed his business and lined up for hours at an emergency clinic to receive an ISG injection. He then had an adverse reaction to the ISG for which he attended at the Vancouver General Hospital.

> Amended Statement of Claim, Appeal Record, p. 17–29, Tab 1
> Affidavit #1 of Helen Fakhri, paras. 2 and 3, Joint Appeal Book, pp. 161-62
> Affidavit #1of Ady Aylon, paras. 6-9, Joint Appeal Book, pp. 157-158
> Appellant's Factum, para. 41

27. A survey of British Columbia decisions involving facts similar to Mr. Aylon's reveals that his claim, and the claims of other class members like him, do have value, and are properly compensated by British Columbia courts. In *Fitzgerald* v. *Tin*, a plaintiff was awarded $15,000 for anxiety when she reasonably believed that she had been exposed to the risk of infection with HIV after being pricked by a hypodermic needle left negligently by the defendant in the back of a taxi cab.

> *Fitzgerald* v. *Tin*, [2003] B.C.J. No. 203 (Q.L.) (B.C.P.C.); 2004 BCPC 13

28. In *Wharton* v. *Tom Harris Oldsmobile Chevrolet Ltd.*, this Honourable Court upheld a verdict of $7,257.17, including non-pecuniary damages for inconvenience to a plaintiff who had purchased a defective product. This Court affirmed an award for frustration and anxiety in an action alleging a breach of the implied warranty of fitness under the *Sale of Goods Act*. This is the same cause of action asserted by the purchaser subclass in the within action.

> *Wharton* v. *Tom Harris Oldsmobile Chevrolet Ltd.*, [2002] B.C.J. No. 278 (Q.L.) (B.C.C.A.); 2002 BCCA 87

29. In *Toews* v. *Weisner*, a plaintiff recovered damages of $1,000 when she was required to receive a vaccination without her consent.

> *Toews* v. *Weisner*, [2001] B.C.J. No. 30 (Q.L.) (B.C.S.C.); 2001 BCSC 15

30. Mr. Aylon and other uninfected class members have similar damages. They reasonably feared infection with a serious disease for which they have suffered anxiety and inconvenience, and for which they have been required to seek vaccinations to mitigate their risk of harm. These are not vaccinations which these class members would otherwise have required or consented to.

31. This action is proceeding as a class action, and was properly certified as such, because the damages suffered by class members, while real, are modest. The allegations of negligence in this case require expert evidence on the issue of duty of care. Should the Appellant have vaccinated all of its workers against infectious diseases as recommended by the British Columbia Medical Officers of Health in 1999? Did the Appellant have had proper training and supervisory systems in place to require its workers to properly and thoroughly wash their hands, and use gloves and utensils when handling food? What other steps should the Appellant have taken to prevent the epidemic? Were the food products of merchantable quality and fit for their intended purpose as required by the *Sale of Good Act*? It is simply not economic for Mr. Aylon to litigate his claim individually for the recovery of a few thousand dollars, when the cost of assembling the expert and documentary evidence he needs will exceed that amount. Madam Justice Gerow correctly realized that only a class action could provide Mr. Aylon and other class members with the necessary procedural vehicle to allow for the aggregation of claims and the sharing of costs such that this action can be pursued. Her decision is entirely consistent with the purposes of class actions as expressed by Chief Justice McLachlin:

> "As I discussed at some length in *Western Canadian Shopping Centres*, class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public."
>
> *Hollick* v. *Toronto*, [2001] 3 S.C.R. 158, para. 15; 2001 SCC 68

32. The Appellant may argue that the individual damages claimed in this case are small, but this is a matter of perspective. The $1,000 awarded to each class member in the *Anderson* case

who reasonably feared that they had been infected with hepatitis may not be such a small thing to the ordinary citizens involved. Such an award can provide vindication and comfort to persons whose health was placed at risk by the carelessness of others.

> *Anderson* v. *Wilson*, Settlement Approval Order, Mackinnon J., Ontario Superior Court of Justice, January 2, 2002

33. If the Appellant wants to argue that Respondents have suffered no damage, then the place to do that is at trial. Certification is not a consideration of the merits of the action.

> *Hollick* v. *Toronto*, [2001] 3 S.C.R. 158, at para. 16; 2001 SCC 68

34. Further, litigation is about more than just money. Class actions, in particular, can be a form of public interest litigation. The Respondents have raised important issues of public safety regarding our food supply. The Respondents seek not just compensation. They want assurance that this kind of outbreak will not happen again, and that food companies who fall below a reasonable standard will be held accountable.

35. In weighing preferability in this case, Madam Justice Gerow recognized the importance of the legislative goals of the *Class Proceedings Act*, including the goal of behaviour modification. She wrote:

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

> Reasons for Judgment, para. 101, Appeal Record, p. 77, Tab 3

C. Punitive Damages

36. This Honourable Court has already certified punitive damages as an appropriate common issue on at least two occasions in *Chace* v. *Crane* and *Rumley* v. *British Columbia*. The Supreme Court of Canada unanimously affirmed this court's decision in *Rumley*. It is accepted law that punitive damages focus on the defendant's conduct and are an appropriate common issue in a class action. As this Honourable Court held in *Rumley*:

"Any award for punitive damages should reflect the overall culpability of the defendant. It does not have to be linked to the harm caused to any particular claimant and does not require individualized assessment. A global award can be assessed for the successful class members as a group, and allocated among them as the trial judge considers appropriate. The plaintiffs would be required to succeed on a common issue related to sexual abuse as well as proving moral culpability to establish a foundation for punitive damage.

As compensatory damages also punish the defendant indirectly, any award for punitive damages should take into account the quantum of compensatory damages awarded. In the context of a class proceeding, that suggests that the assessment of any award for punitive damages should be deferred until the total amount of compensatory damages has been assessed."

Rumley v. British Columbia (1999). 72 B.C.L.R. (3d) 1, para. 48-9; 1999 BCCA 689; affirmed. [2001] 3 S.C.R. 184, para 34; 2001 SCC 69
Chace v. Crane Canada Inc. (1997), 44 B.C.L.R. (3d) 264 (C.A.), paras. 25-26

37. The Appellant's appeal on punitive damages is without merit. The Appellant's complaint about punitive damages has nothing to do with commonality, but rather with timing. The Appellant says that the issue of punitive damages cannot be resolved until after the quantum of compensatory damages has been assessed. This is not grounds for appeal of certification. Rather, this is a matter the Appellant should raise with the trial judge in terms of the scheduling of the common issues trial. As stated in *Rumley*, the defendant may simply ask the trial judge to defer assessment of punitive damage until after assessment of compensatory damages has been completed.

Rumley v. British Columbia (1999), 72 B.C.L.R. (3d) 1, para. 48-9; 1999 BCCA 689; affirmed. [2001] 3 S.C.R. 184, para 34; 2001 SCC 69
Appellant's Factum, para. 54

D. Inclusion of "Settled" Claims in Class Definition

38. It is not unusual for some class members to reach settlements of their individual claims either before or after a class action is certified. There is no need to amend the certification order every time such an individual settlement is reached. The defendant will have its release, and a complete defence against such individual claims if the release was validly obtained.

39. On the evidence before Madam Justice Gerow there was no basis to exclude the purportedly "settled" claims from the class definition. The court had insufficient evidence to evaluate whether such releases were validly obtained, or might be subject to challenge as improvident, or were made by a person under a disability without court approval.

Supplemental Reasons, para. 3, Supplemental Appeal Record, p. 2

40. The issue of whether a release is validly obtained is an individual issue affording the defendant an individual defence at the individual issues stage of a class proceeding. If a release is validly obtained then the Appellant has nothing to worry about. Conversely, if the release is invalid then the class member should not be excluded from the action. Either way, there is no prejudice to the Appellant from a class definition which includes purportedly settled claims. The learned Chambers Judge held:

> "If individuals have settled with the defendant then they will not be able to advance any claim in this action but the definition itself, in my view, does not need to exclude them."

Supplemental Reasons, para. 3, Supplemental Appeal Record, p. 2

E. Conclusion

41. Madam Justice Gerow did not "misapprehend" the evidence before her. She correctly applied the accepted legal principles under the CPA and weighed the facts presented. She made findings of fact that there were no viable alternatives to class litigation in this case given the modest claims of class members, and the nature of the negligence allegations advanced. She found as a matter of fact that the Respondent had presented a manageable plan for the conduct of this litigation, and that resolution of individual issues would not be onerous. Accordingly, she exercised her discretion to certify the action.

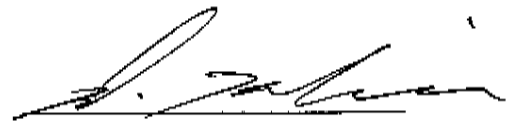
42. The Appellants may disagree with the outcome of the certification motion, but they have failed to satisfy the high threshold test for an appeal from such a discretionary order. They have failed to show that the learned chambers judge was clearly wrong. Their appeal on the issue of

punitive damages is plainly without merit. Their appeal regarding "settled" claims is unnecessary. The Appellants have failed to raise any important legal issues that require appellate review.

PART 4 – NATURE OF ORDER SOUGHT

43. The Respondent requests that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 8th day of April 2004.



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LIST OF AUTHORITIES

Statutes

Cases