Citation: Harrington v. Dow Corning Corp. 2000 BCCA 605

Date: 20001108

Docket: **CA21810 CA21857 CA21843 CA21868 CA21855 CA21929 CA22983**

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

HELEN HARRINGTON, AS REPRESENTATIVE PLAINTIFF

Plaintiff
(Respondent/Appellant)
(Appellant by Cross-Appeal)

AND:

DOW CORNING CORPORATION, DOW CORNING CANADA INC., THE DOW CHEMICAL COMPANY, DOW CORNING-WRIGHT CORPORATION, McGHAN MEDICAL CORPORATION, McGHAN NUSIL CORPORATION, MINNESOTA MINING AND MANUFACTURING COMPANY (3M), INAMED CORPORATION, UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., UNION CARBIDE CORPORATION, BAXTER HEALTHCARE CORPORATION and MENTOR CORPORATION

Defendants
(Respondents)
(Respondents by Cross-Appeal)

AND:

BRISTOL-MYERS SQUIBB COMPANY, MEDICAL ENGINEERING CORPORATION, THE COOPER COMPANIES INC., DOW CORNING CORPORATION, DOW CORNING CANADA INC., THE DOW CHEMICAL COMPANY, McGHAN MEDICAL CORPORATION, MINNESOTA MINING AND MANUFACTURING COMPANY (3M), and BAXTER HEALTHCARE CORPORATION

Defendants
(Appellants/Respondents)
(Respondents by Cross-Appeal)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENOR

Before: The Honourable Mr. Justice Esson
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Finch
The Honourable Madam Justice Ryan
The Honourable Madam Justice Huddart

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Place and Date of Hearing:	Vancouver, British Columbia March 27-28, 2000
Additional Written Submissions:	28 June 2000
Place and Date of Judgment:	Vancouver, British Columbia 8 November 2000

Written Reasons by:
The Honourable Madam Justice Huddart

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Madam Justice Ryan

Dissenting Reasons by:
The Honourable Mr. Justice Esson (Page 85, para. [156])
The Honourable Mr. Justice Finch (Page 60, para. [102])

Reasons for Judgment of the Honourable Madam Justice Huddart:

[1] This appeal is from an order certifying this action as a class proceeding. The claim is against manufacturers of silicone breast implants and Bristol-Myers Squibb Company, a supplier of silicone. A resident and non-resident subclass were described, each comprised of women who have been implanted with silicone gel breast implants and suffered an injury caused by the implant. The reasons of Mr. Justice Mackenzie, then of the Supreme Court, are reported at (1996), 22 B.C.L.R. (3d) 97 (S.C.). The action has been resolved since the certification order was made with regard to the Dow defendants as part of a North America-wide settlement.

[2] The respondent, Helen Harrington, was appointed the representative plaintiff of the Resident Class and Betty Gladu was appointed for the Non Resident Class. Their claim is that silicone breast implants cause local complications and systemic disease, sometimes referred to as auto-immune and connective tissue diseases. They allege that given the risks of the implantation of these devices, they should not be manufactured or marketed for use in a human body. Alternatively, they allege that the manufacturers and distributors are under a duty to warn a potential customer of the harm inherent in the use of the prosthesis to permit the

customer a fully informed choice whether to have a surgeon implant one in her body. Only the claims in negligence are relevant to this appeal. The case management judge excluded contractual claims from class determination because they applied to a limited number of individuals in special circumstances where privity of contract existed. He set down the common issue: are silicone gel breast implants reasonably fit for their intended purpose?

[3] Silicone is the name given to a family of synthetic polymers. The bonds between its elements do not exist in nature. Silicone polymers come in the form of liquid or oil, gel, and elastomer (rubber). They are not to be confused with silicon (Si) compounds such as sodium silicate, silica gel, and siliceous earth. The most common example of a silicone is polydimethylsiloxane (PDMS), of which most, if not all, breast implant shells and silicone liquid or gel fillings are made. The evidence suggests there is no substantial difference among the various styles of implants produced by the manufacturers.

[4] The appellants claim to have manufactured and distributed, through hospitals and physicians, about 80 different styles of implants; all have a silicone elastomer shell filled with silicone gel or a saline solution. They are persuaded that there is no reliable scientific evidence

supporting any association between silicone breast implants and systemic disease, whether classic or atypical. They consider the risks of rupture and local complications to be manageable. Since 1975, medical professionals have been provided with information about such risks by way of package inserts.

[5] First, the appellants ask this court to set aside the certification order because the issue stated does not meet the requirements for a "common issue" under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50. Second, if it does, they submit a class proceeding is not the preferable procedure for its resolution. The respondent asks this court to vary the certification order to include saline-filled breast implants in the common issue and the women who received them in both subclasses.

[6] Finally, if a class proceeding is the preferable procedure for the resolution of the common issue, the appellants seek to have the members of the class restricted to residents whose claims have a real and substantial connection with British Columbia.

[7] As a preliminary matter, the appellants questioned the fairness of the process by which the case management judge determined the common issue and decided that the preferable

procedure for its resolution was a class proceeding. These two issues are central to a decision whether to certify an action as a class proceeding. The appellants' view is that, if they were not decided fairly, this court should either consider the matter anew without deference to the case management judge or remit the matter to the Supreme Court for reconsideration in a fair process. The appellants' complaint about the Supreme Court process is that they were not allowed to make submissions on the specific common issue which the case management judge certified.

[8] The mechanism at the heart of the ***Class Proceeding Act*** is the certification of common issues (s. 8(1)(e)) that for reasons of fairness and efficiency (s. 4(2)) should be determined in a single proceeding (s. 11(1)) that binds every member of the class or subclass(s. 26(1)) who has not opted out (s. 16). It is important to note that, unlike many jurisdictions in the United States, the certification of a class proceeding is not entirely discretionary in British Columbia.

[9] In ***Campbell v. Flexwatt*** (1997), 44 B.C.L.R. (3d) 343 (C.A.), Mr. Justice Cumming emphasized the discretionary aspects of a certification order, commenting at para. 25:

> ...Appellate courts are always slow to interfere with

> discretion properly exercised. This course should be particularly so in considering the terms of a certification order. The Legislature enacted the *Class Proceedings Act* on 1 August 1995 to make available in this province a procedure for the fair resolution of meritorious claims that are uneconomical to pursue in an individual proceeding, or, if pursued individually, have the potential to overwhelm the courts' resources. Class proceedings are an efficient response to market demand only if they can resolve disputes fairly. Trial court judges must be free to make the new procedure work for plaintiffs and defendants. Many of the arguments made by counsel for the appellants, focused on fairness to the defendants and third parties, can be made to the chambers judge charged with managing the action as it proceeds. In considering those arguments, I will be keeping in mind the ability of the chambers judge to vary his order from time to time as the action proceeds and the need arises, whether from concern about fairness or efficacy; he may even decertify the proceeding. I shall also keep in mind that this court will interfere with the exercise of discretion only when persuaded that the chambers judge erred in principle or was clearly wrong.

[10] However, not all matters required by s. 4 to be considered at a certification hearing involve an exercise of discretion, as is apparent from the wording of these relevant provisions:

> [6] 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
> (b) there is an identifiable class of 2 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;

(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 class members of the proceeding, and

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

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
(b) the relief claimed relates to separate contracts involving different class members;
(c) different remedies are sought for different class members;
(d) the number of class members or the identity of each class member is not known;
(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

11 (1) Unless the court otherwise orders under section 12, in a class proceeding, common issues for a class must be determined together,
(a) common issues for a subclass must be determined together, and
(b) individual issues that require the participation of individual class members must be determined individually in accordance with sections 27 and 28.
(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

12 The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

25 An order made in respect of a judgment on common issues of a class or subclass must
(a) set out the common issues,
(b) name or describe the class or subclass members to the extent possible,
(c) state the nature of the claims asserted on behalf of the class or subclass, and
(d) specify the relief granted.

[11] The appellants are of the view that the respondent did not satisfy the requirements of s. 4(1)(c) or (d). Included in their submissions with regard to the preferability of a class proceeding is a criticism of the plan put forward by the respondent for advancing the proceeding. However, they do not suggest the requirement for a representative plaintiff has not been met.

The Common Issue

[12] The essence of Mr. Justice Mackenzie's reasoning with regard to the common issue is found in paragraphs 28 to 43:

> The Efficacy of the ***Bendall/Dante*** Questions
>
> 28 This application comes down to the critical question of whether "the claims of the class members raise common issues, ..."as required by s. 4(1)(c) of the ***Class Proceedings Act***. Plaintiff's counsel urge upon me the decision in ***Bendall v. McGhan Medical Corp***. (1993), 14 O.R. (3d) 374, as a precedent for certification which I should follow. In one of the first certifications under the Ontario *Class Proceedings Act*, Montgomery J. of the Ontario Court, General Division, followed *Dante v. Dow Corning*, 143 F.R.D. 136 (S.D. Ohio, 1992), which certified a national breast implant class action in the United States. The common issues determined by Montgomery J. were identical to the common issues contained in the order of Judge Rubin in ***Dante*** as follows:
>
> (A) What information did the Defendants have regarding adverse effects from silicone gel

breast implants and when was that knowledge available to them?

(B) Are silicone gel breast implants likely to cause specific medical conditions?

(C) Were adequate notices of either of the foregoing given by the Defendants?

29 Plaintiff's counsel ask that, if I were to follow the common issues stated in ***Bendall*** and ***Dante***, a fourth common issue should be added as follows:

Are breast implants fit for their intended purpose?

30 Alternatively, plaintiff's counsel submits a list of 18 more detailed questions as set out in appendix 1 to these Reasons. Question 11 on the detailed list repeats the question counsel proposes to add to the ***Bendall/Dante*** questions.

31 The litigation in ***Bendall*** has not proceeded beyond the certification order. The ***Dante*** litigation does not appear to have moved ahead either. The questions remain untested and I think they require re-evaluation in the light of ***Hollis*** [*Hollis v. Birch*, [1995] 4 S.C.R. 634] and the more recent American cases discussed above.

32 Issue (A) above does not admit of a simple comprehensive answer. The inference from ***Hollis*** is that at some point between 1977 and 1983 Dow Corning had sufficient information about instances of unexplained ruptures of that model of implant that it should have informed patients through their doctors. Information available to other defendant manufacturers and the resulting duty to warn may vary from manufacturer to manufacturer and perhaps from model to model; later models of implants may have reduced incidents of rupture. Other risks imposing a duty to warn, and the warnings given, are likely to vary from manufacturer to manufacturer and model to model.

33 Issue (B) raises problems of definition as well as causation related to "specific medical conditions". As discussed above, there are apparently a number of atypical connective tissue diseases or syndromes potentially involved as well as more generalized complaints, such as chronic fatigue and chronic pain syndromes, which resist definition. Definitions used for

various settlement agreements are practical expedients but would not be adequate for trial purposes. Localized medical conditions can be caused by the rupture of a breast implant, as ***Hollis*** demonstrates, but such complications will also be varied.

34 Issue (C) raises issues both of timeliness and adequacy of notice which are likely to vary from manufacturer to manufacturer, product to product and risk to risk.

35 Thus the three ***Bendall/Dante*** issues inevitably will dissolve into a variety of more specific questions. The answer to each of the questions may be of significance to some members of the class but not to all. With one exception, the 18 questions submitted by plaintiff's counsel as an alternative to the ***Bendall/Dante*** questions also fail the test of commonality. The exception is the same issue which plaintiff's counsel submitted should be added to the ***Bendall/Dante*** issues, were I to certify them. That is, "Are breast implants fit for their intended purpose?"

The Fitness Issue

36 The plaintiff's case is that breast implants are unfit because of their rate of failure, the association of silicone with connective tissue disease, and localised complications. It also has been alleged that breast implants may be a factor in breast cancer, either as a cause of cancer or as an impediment to mammography thereby interfering with the timely diagnosis of breast cancer. Cancer was not stressed in the certification proceedings, and most of the attention was directed to the other categories.

37 It is alleged that breast implants were not properly tested before they were marketed and the variety of health risks they present to women remained undetected or were ignored. Breast implants did not receive any regulatory evaluation or approval in Canada or the United States.

38 On the plaintiff's theory, all women with implants face an unreasonable risk of harm. The question which troubles thousands of women who have silicone gel breast implants is - Are my implants safe? That question

extends to the whole range of models of silicone gel breast implants distributed by the various manufacturers.

39 This theory goes far beyond the underpinnings of liability in ***Hollis*** where, following the plaintiff's unfortunate experience with her first implants, the evidence disclosed that she was re-implanted with a later model of silicone gel filled Dow Corning implants about which there were no complaints. Fitness is not a question that ***Hollis*** addressed comprehensively because that case went forward on limited evidence. The appellate courts rejected the trial judge's conclusion of negligent manufacture on the ground that he misapprehended certain evidence of the relationship between two models of breast implants manufactured by Dow Corning. Neither appellate court explored the issues of negligent manufacture or fitness for the purpose beyond that limited context.

40 Plaintiff's counsel want to attack the fitness of both silicone gel and saline implants. Notwithstanding that saline breast implants contain a silicone in the implant shell, I am not satisfied that the issues of fitness are common to both silicone gel and saline implants. The challenge of addressing the fitness of silicone gel breast implants as a generic issue will be sufficiently formidable without complicating it further by adding saline implants. Saline breast implants are still being routinely implanted into patients. Neither Health and Welfare Canada nor the Food and Drug Administration in the United States have imposed moratoriums on saline implants as they have for silicone gel implants. I am not aware of any class action certification in any other jurisdiction involving saline implants. The common issue should be limited to breast implants containing silicone gel.

41 I am satisfied that the question: Are silicone gel breast implants reasonably fit for their intended purpose? - raises a threshold issue which is common to all intended members of the class who have been implanted with silicone gel breast implants and to the several manufacturers of such implants. If the plaintiff succeeds on this issue, then it moves the class a long way to a finding of liability. Quantum of damages would still have to be individually assessed but s. 7(a) of the Act makes clear that individual assessment of damages is

not a barrier to certification.

42 The common issue of fitness would require that silicone gel breast implants would have to be considered generically as a group, ignoring differences among the particular models of the various manufacturers. In practical terms, the plaintiff would be required to establish unfitness against the model of silicone gel breast implant which has the strongest claim to fitness. Only as against that standard could the issue be said to be common to all manufacturers and all models. Warnings of risk would be irrelevant if no silicone gel filled breast implants should have been manufactured and distributed, and liability would attach to the unfit product.

43 To a degree, the common issue will raise the same medical problems of causation and definition that are contained in more specific questions I have rejected. However, the issue will be raised in the context of an assessment of the overall risk, presumably through expert opinion. This should permit some appraisal of the incidence and severity of atypical conditions which may be caused by the silicones involved without requiring precise definition of atypical conditions. Essentially it is the same risk assessment that a manufacturer ought to undertake before putting the product on the market. The difficulties inherent in the assessment of risk are not an excuse for declining to make such an assessment.

[emphasis added]

[13] During the five-day hearing before Mr. Justice Mackenzie, counsel addressed the three ***Bendall/Dante*** questions which the respondent relied upon for certification in her notice of motion, and the 18 further issues provided to the court, on a list the second day. Included among them, as Mr. Justice Mackenzie noted in the portion of his reasons quoted above, was the question "[a]re breast implants fit for their intended purpose?"

[14] There can be no doubt that the appellants were given ample opportunity to persuade the court why that question was not common to a class and why its resolution by a class proceeding was not the preferable procedure. Obviously, Mr. Justice Mackenzie was not persuaded by their submissions that this question was not a common one. Just as he was not persuaded by the respondent that the first three questions, or any other from their further list of 18, were common to all members of the proposed class. This does not mean he did not hear the submissions, only that he rejected them.

[15] Evidently his analysis of the evidence and submissions led him to conclude that a question about the fitness of silicone gel implants would resolve a material issue of fact, thus enabling the litigation to be advanced, and therefore should be tried at a common trial. He appeared to be concerned with whether the respondent would be content with a certification order based only on the question of fitness: are any of the silicone gel breast implants with which members of the class have been implanted reasonably fit for their intended purpose? At a further brief hearing, he ascertained that the respondent would accept a certification based only on that issue. He did not permit any further submissions by the parties.

[16] The appellants wanted to advance an argument based on s. 25(d) of the ***Class Proceeding Act*** that the result of the common issue must be capable of extrapolation to all defendants and that this was not the case with the question the trial judge was proposing to certify. Section 25(d) mandates that an order made in respect of a judgment on common issues must "specify the relief granted." The order of Mackenzie J. was specific that no relief need be granted. The appellants submit that Mackenzie J. failed to consider this submission.

[17] Instead, the appellants submit Mackenzie J. was addressing a different submission about a different question (Are breast implants fit for their intended purpose?) at paras. 46 and 47 of his reasons:

> 46 Mr. Berardino contended that a common issue can only meet the test of a "common issue" required by s. 4(1)(c) if it is determinative of liability, or provides a ground for some relief. The common issue under consideration in this case would fail such a test because a finding that silicone implants were unfit would still leave open the question of whether the manufacturer was careless in failing to appreciate the risk or adequately test the implants before they were marketed. The evidence and conclusion could vary from manufacturer to manufacturer, model to model, and time to time. Thus an answer favourable to the plaintiff would not lead automatically to relief.
>
> 47 The ***Act*** defines common issues. Section 1 states:

> "common issues" means
>
> (a) common but not necessarily identical issues of fact, or
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;
>
> Under this definition the common issue need only be an issue of fact. Presumably such a factual issue should involve a material fact in the case in order for the finding to advance the proceedings. In addition, the finding would be binding on all members of the class and other parties to the case. But there is nothing in the definition that requires that a common issue of fact be sufficient in itself to support relief, and such a restrictive view of "common issue" could undermine the needed flexibility of class action proceedings. No class action case was cited to me in support of Mr. Berardino's submission. I am satisfied that the common issue set out above meets the test of a common issue as defined in the Act.

[18] The appellants submit that in light of the refusal of Mr. Justice Mackenzie to hear submissions on the proposed single issue, this Court should consider *ab initio* whether the common issue is, in fact, a proper common issue, and whether a class proceeding is the preferable manner for resolving the common issue without according deference to the exercise by the chambers judge of his discretion under the ***Class Proceeding Act***.

[19] I would not so expand this court's review of the order in this case; I am not persuaded the appellants were denied fair process. Had I been persuaded that the matter of

preferability should be considered anew, I would have returned it to the trial court. I reach this conclusion because a certification order is interlocutory and concerns case management, a task for which this court, as a court of error, is ill-equipped, either in authority or experience.

[20] In the discussion before us and in the authorities as to what constitutes a common issue there appears to be some confounding of the question of whether a common issue of fact exists with the question of the significance of that common issue to the cause of action as a whole. This confusion seems to have developed from the well-accepted view that to be a "common issue" an issue of fact or law need not be one that is determinative of liability, but one that will "move the litigation forward." Such a determination should be relatively straight-forward. I think it would be rare for plaintiffs to state a question for consideration as a common issue that did not move the litigation forward in a legally material way.

[21] The appellants ask us to consider the discussion of common issues in ***Rosedale Motors Inc. v. Petro-Canada Inc.*** (1998), 42 O.R. (3d) 776 at 785 (Ont.Ct. G.D.). Sharpe J. (then of the trial court) noted the importance of keeping in mind the cause of action as a whole and cautioned against getting lost in the details of determining what would move the

litigation forward. He formulated a question the appellants ask this court to consider in determining whether the respondent has established the existence of a common issue at 785:

> Can it be said, in the context of the other issues and the cause of action as a whole, that the determination of the proposed common issue will actually decide and dispose of one aspect of the case that will move the litigation forward?

[22] Mr. Justice Cumming wrote to similar effect at para. 53 in ***Campbell,*** *supra*:

> [7] When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.

[23] I would have thought that the word "issue" simply meant a point in question, a point affirmed by the plaintiff and denied by the defendant. If the point of fact or law is necessary to the successful prosecution of the cause of action (or in some circumstances to its defence), then its resolution will inevitably move the litigation forward. The degree of materiality and the interplay among the various common and individual issues is a matter for consideration under

s.4(1)(d) and thus s. 4(2), not a matter for consideration under s. 4(1)(c).

[24] More important to a determination of common issues is the requirement that they be "common" but not necessarily "identical." In the context of the ***Act***, "common" means that the resolution of the point in question must be applicable to all who are to be bound by it. I agree with the appellants that to be applicable to all parties, the answer to the question must, at least, be capable of extrapolation to each member of the class or subclass on whose behalf the trial of the common issue is certified for trial by a class proceeding. As the appellants note, this requirement will, of necessity, require that the answer be capable of extrapolation to all defendants who will be bound by it. This is the requirement the appellants argue that the case management judge overlooked in determining the common issue: are silicone gel breast implants reasonably fit for their intended purpose?

[25] In my view, this court is not limited in its consideration of this ground of appeal by concerns of deference to an exercise of discretion.

[26] Mr. Justice Mackenzie noted at 647 in ***R.(L.) v. British Columbia*** (1999), 180 D.L.R. (4th) 639 (B.C.C.A.), that plaintiffs are "entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class

proceedings if they choose." The provision for multi-staged proceedings in the ***Class Proceeding Act*** is a persuasive indicator that a representative plaintiff is entitled to restrict the common issues to be considered for certification to one legally operative question. (I note in passing that nothing turns on the use of the plural "issues" in the ***Act***. To suggest otherwise would lead to silly arguments about irrelevancies. Most issues are multi-faceted.)

[27] The respondent accepted the restriction of her application to one common issue. She is persuaded that the threshold across which she must travel in order to establish the liability in negligence of any defendant is to prove on a balance of probabilities that silicone breast implants as a generic group are defective, i.e. unfit for use in a human body, whether filled with a saline solution or silicone gel. Implicit in the submission that this is a common issue is the view that failure to establish generic unfitness will mean the end of the class action and the foreclosure from further suit of all members of the class. However, explicitly, the respondent states only that proof of fitness will terminate the class action.

[28] The practical difficulty with her submission is that the evidence placed before the chambers judge suggests the answer to this question is unlikely to be controversial at some level

of generality. The introduction of any foreign material into a human body produces some risk of harm, and the risk of rupture exacerbates that inherent risk. All appellants provided warnings of risks of localized injury and have done so in one form or another since at least 1975. The uniform conclusion of three published reports proferred by Baxter Healthcare, as new evidence on this appeal, is that more must be learned about the specific complications arising from each of the models. They recommend that minimum standards be set for advice to potential customers about breast implants so that potential recipients can make a rational choice fully aware of the risks that inhere in each model as best science can identify them.

[29] To the extent an outcome can be predicted on the basis of the evidence before the case management judge, there seems to be little merit in the allegation that silicone breast implants, whether filled with silicone or saline, are associated in any way with systemic disease, whether classic or atypical: ***In re Breast Implant Litigation***, 11 F. Supp. 2d 1217 (D.Colo.1998). Mr. Justice Mackenzie did not have the advantage of Judge Sparr's careful analysis on a ***Daubert*** motion [*Daubert v. Merrell Dow Pharmaceuticals Inc.,* 509 US 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993)] of the available scientific evidence when he made the certification order in

this case. However, it is likely he had that potential outcome very much in mind.

[30] Realistically, on the common issue stated by the case management judge, the issue of fact is likely to be whether the rate of failure and the extent of localized complications are such that silicone gel-filled breast implants should not have been manufactured or distributed. One potential result is that manageable risks inhere in all such breast implants. In that event, the risk assessment may devolve into separate proceedings for further subclasses where the nature and extent of each individual defendant's duty can be determined, as the case management judge recognized.

[31] It is difficult to assess the probability of that happening on the evidence. I was unable to find any useful evidence in the materials to suggest the nature or extent of the risks inherent in all breast implants or that the knowledge of such risks may have varied overtime with models and with manufacturers. There is, however, some evidence that manufacturers shared a common knowledge base and relied on the same scientific studies reported in the medical literature in their product development and marketing.

[32] The new evidence Baxter Healthcare asks this court to consider, for the most part confirms the impression one gets from the evidence before Mr. Justice Mackenzie. I would admit

that evidence in the absence of any serious objection by the respondent. It consists of three public reports of which arguably this court could take judicial notice in any event: ***Silicone Gel Breast Implants***, the Report of the Independent Review Group (July 1998) established by the Chief Medical Officer of the United Kingdom at the request of the Minister of Health; ***Silicone Breast Implants in Relation to Connective Tissue Diseases and Immunologic Dysfunction***, a Report by a National Science Panel in the Federal Breast Implant Multi-District Litigation (December 15, 1998); and ***Safety of Silicone Breast Implants***, Institute of Medicine, National Academy Press, Washington, D.C. (1999).

[33] Liability for the manufacture of a product depends on proof that the product falls short of what it was reasonable to expect the product to be in all the circumstances (i.e. the product is defective), or that use of the product could result in injury (i.e. the product is dangerous and requires a warning either as to its proper use or to give the customer the right of an informed choice). What is reasonable to expect of a product and a manufacturer is largely a question of the assessment of practically discoverable risks. This means that the state of the art will be as central to risk assessment with regard to breast implants as many experienced

American judges have considered it to be with regard to asbestos.

[34] At the heart of this appeal is whether the state of the art over more than 25 years can be considered generically, such that a risk assessment with regard to one model of silicone gel-filled breast implant could fairly bind those who manufactured or purchased other models.

[35] As we have seen, the case management judge recognized that a risk assessment would probably require the respondent "to establish unfitness against the model of silicone gel breast implant which has the strongest claim to fitness" because "only as against that standard could the issue be said to be common to all manufacturers and all models." This observation and his refusal to include saline-filled breast implants in the risk assessment flow from Mr. Justice Mackenzie's inference (at para. 32 of his reasons cited earlier) from ***Hollis****, supra*, that there might be differences among models. That view did not, however, dissuade the case management judge from certifying a class proceeding for the resolution of the fitness of silicone gel-filled devices.

[36] In this regard, two comments in the **Institute of Medicine** report, *supra*, are worth noting. From the *Preface*:

> …[T]he report of the National Science Panel is a model of the provision to the courts of the best available scientific advice in a matter in which balanced and

> informed scientific information and judgment are essential.

At 52:

> In view of the many manufacturers, major construction types, varying and changing shell elastomer rubber, gel, and surface characteristics, barrier layers, and other less meaningful differences, it is easy to appreciate why there were hundreds of types of implants. In fact, if dimensions, shape, and patch and valve characteristics are added to the variables, Middleton has estimated that as many as 8,300 different implants might have been available. Some of these can be identified by implant surface markings, which are sometimes radiopaque, or by other characteristics that are unique to a particular implant and identifiable either on explantation or by techniques such as film or MRI mammography. Identification can be useful in assessing the way implants might behave and has of course been useful in litigation (Middleton, 1997, 1998a). Presumably, gel, saline, or other filler, smooth or textured surface, barrier layer or standard elastomer shell, elastomer shell thickness, physical or chemical characteristics, other physical and chemical gel and gel fluid characteristics and compositions, and the presence and concentration of non-silicone substances (e.g., catalysts or other substances remaining in the implant from the manufacturing process), would represent a minimum list of features that might have biomedical and health implications, either local or possibly systemic. Information on the product characteristics introduced over time by various manufacturers and distributors could help in analyzing these associations. This information, often considered in the nature of trade secrets, is not available in any detail. Even the information in this chapter was not easy to assemble and has not previously been assembled in this way.
>
> [emphasis added]

[37] With the light provided by this comment, it is not surprising that a court might have difficulty in appreciating

the significance of alleged differences in what most of the material before the chambers judge treated as essentially generic breast implants. The evidence that the appellants provided to the chambers judge was less than helpful in this regard. Nevertheless, the fundamental proposition they put to us was that there was insufficient evidence before the chambers judge to permit him to decide that a resolution of the fitness issue for one model could be extrapolated fairly to others.

[38] In approaching a review of the certification order, I am mindful, as was Mr. Justice Cumming in ***Campbell,*** *supra,* that the legislature built flexibility into the certification criteria. This permits an action to devolve into a series of splinter proceedings involving one or more primary classes and sub-classes, and into individually determined claims, as the nature of the issues to be decided requires. I am also mindful of the stricture of Judge Smith in ***Castano v. American Tobacco Company*** 84 F.3d 734 (5th Cir.1996), at para.25:

> … Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.

[39] It follows from this stricture that a defendant, who fails to provide evidence to support its position on a motion for certification, risks facing an unsatisfactory outcome. In my view, it is not good enough for a manufacturer to say the onus is on the plaintiff; the plaintiff must establish that the proposed question is common to all plaintiffs and causally linked with all defendants; so, I will keep my trade secrets and not provide the court with information explaining how the products supplied to the plaintiffs may materially differ one from the other; and, I will rely on my statement that there are different models produced in different years with material differences.

[40] This is an unacceptable approach to products liability litigation in the context of a mass tort claim. When a plaintiff produces epidemiological studies that treat products of all defendants as generic, it behooves any defendant who is of a contrary view to produce evidence supporting its view. As Professor Boodman noted in an article entitled ***The Malaise of Mass Torts,*** (1994) 20 Queen's Law J. 213 at 242, modern methods of mass production and distribution often make it difficult or impossible to identify the exact source or sources of injury, to link a particular victim to a particular defendant, and to demonstrate accurately the harmful effects of a defendant's act other than on the basis of

epidemiological studies and statistical probabilities. Class proceedings were designed with precisely these uncertainties in mind.

[41] On the basis of the evidence before him, the chambers judge saw fitness as a generic issue common to all silicone gel breast implants. Fitness would advance the litigation because the trial of that issue would move the plaintiffs significantly toward establishing liability. I am not persuaded he erred in so finding.

[42] At the risk of oversimplifying a complex decision-path, I venture to suggest the first step in every products liability case alleging negligent design, manufacture, or marketing is the determination of whether the product is defective under ordinary use or, although non-defective, has a propensity to injure. Some American authorities refer to this step as "general causation", whether a product is capable of causing the harm alleged in its ordinary use.

[43] The second step is the assessment of the state of the manufacturer's knowledge of the dangerousness of its product to determine whether the manufacturer's duty was not to manufacture and distribute, or to distribute only with an appropriate warning. It may be prudent to refer to this as an assessment of the state of the art; it may be that a

manufacturer did not but should have known of its product’s propensity for harm.

[44] In my view, these two steps are the "risk assessment" Mr. Justice Mackenzie permitted to be undertaken as a part of what he saw as a multi-staged proceeding.

[45] If the value of the product's use outweighed its propensity to injure such that distribution with a warning was appropriate, the third step will be an assessment of the reasonableness of the warning (whether direct or by a learned intermediary) given the state of the art and the extent of the risks inherent in the product's use.

[46] The final step will be the determination of individual causation and damages. The difficult question will be whether the individual's knowledge of the risks would have prevented the injury. If the product should not have been manufactured or distributed, the determination of whether the product caused the injuries to the individual seeking damages and the assessment of those damages will be the last step. At this stage, the risks created by the product will be used to determine whether a defendant caused the alleged injury to an individual plaintiff. They may also be used in the determination of the date of discoverability for the purposes of any limitation defence, and for the allocation of fault, if that becomes necessary.

[47] I arrive at this analytic approach from ***Donoghue v. Stevenson*** [1932] A.C. 562 (H.L.) at 580; ***Grant v. Australian Knitting Mills Ltd***., [1936] A.C. 85; ***Phillips v. Ford Motor Co.*** (1970), 12 D.L.R. (3d) 28, [new trial ordered for other reasons, [1971] 2 O.R. 637 (C.A.)]; ***Lambert v. Lastoplex Chemicals Ltd***., [1972] S.C.R. 569; ***Nicholson v. John Deere Ltd.*** (1986), 34 D.L.R. (4th) 542 at 549 (Ont. H.C.J.), (appeal dismissed (1989), 57 D.L.R. (4th) 639 (C.A.)); and ***Hollis v. Birch,*** [1995] 4 S.C.R. 634.

[48] As must be apparent from this discussion, I agree with the case management judge that the issue of fitness is common to all members of the two subclasses that he described. The resolution of this issue will move the litigation forward, in the sense that it will determine a point of fact necessary to the cause of action, and the answer will be capable of extrapolation to all members of the class. The evidence which the case management judge adverted to in his reasons supports his conclusion that the fitness issue is not common to both silicone gel filled and saline filled implants. Thus, I would not vary the question to include the latter type of device.

Preferable Procedure

[49] I am not persuaded the case management judge erred when he determined the risk assessment could fairly and efficiently be undertaken in a single proceeding at the first stage of a multi-stage proceeding.

[50] The utility of such an undertaking in a product liability action can be seen by comparing the course of the trial in ***Palmer v. Nova Scotia Forest Industries*** (1983), 2 D.L.R. (4th) 397 (N.S.S.C.(T.D.)) with that in ***Privest Properties Ltd. v. Foundation Co. of Canada*** (1995), 11 B.C.L.R. (3d) 1 (S.C.) (Drost J.), aff'd (1997), 31 B.C.L.R. (3d) 114 (C.A.). In ***Palmer***, *supra,* Mr. Justice Nunn was called upon to decide whether spraying with certain herbicides would cause damage to health and, thus, be a nuisance. He dismissed the action for want of proof that herbicides in the concentrations proposed posed a health hazard, commenting at 505:

> To my mind, after hearing all the evidence and reading all the exhibits, there is no doubt that the weight of current responsible scientific opinion does not support the allegations of the plaintiffs.

[51] In finding no risk proven, Mr. Justice Nunn was able to dispose of the litigation by taking evidence from 49 witnesses

over 21 days, hearing two days of oral argument, and receiving further written briefs. At 497 he noted:

> The whole trial took on the aura of a scientific inquiry as to whether the world should be exposed to dioxins. Scientists from all over North America, as well as from Sweden were called and testified. Scientific reports and studies from scientists the world over were filed as part of the evidence.
>
> . . .
>
> As to the wider issues relating to the dioxin issue, it hardly seems necessary to state that a court of law is no forum for the determination of matters of science. Those are for science to determine, as facts, following the traditionally accepted methods of scientific inquiry. A substance neither does nor does not create a risk to health by court decree and it would be foolhardy for a court to enter such an inquiry. If science itself is not certain, a court cannot resolve the conflict and make the thing certain.
>
> Essentially a court is engaged in the resolution of private disputes between parties and in the process follows certain time-honoured and well-established procedures and applies equally well-established principles of law, varying and altering them to adjust to an ever-changing society. Part of the process is the determination of facts and another part the application of the law to those facts, once determined, and designing the remedy. As to the occurrence of events, the court is concerned with "probability" and not with "possibility."

[52] The trial in ***Privest*** required 128 days during a two year period. The plaintiffs claimed damages suffered as a result of the removal and replacement of an asbestos-containing fireproofing agent (MK-3) required by the order of the British Columbia Workers' Compensation Board. They alleged that the

removal was necessary because MK-3 was an inherently dangerous product that caused physical damage to property and endangered the health and safety of the building workers and occupants by its release into the atmosphere through natural breakdown and, particularly, when it was disturbed by repairs and renovations. In support of their position, they proffered the ruling of the Workers' Compensation Board. Drost J. preferred the defendant's expert evidence that there was no scientific proof that working with or around the substance in place would create a measurable risk of harm. It is unlikely the issue of inherent dangerousness alone would have required such a long trial. Much of the trial dealt with other issues.

[53] It is not enough, however, that a common issue be capable of fair and efficient resolution by a class proceeding. A class proceeding must be the preferable procedure having regard to "all relevant matters" including the statutory criteria set out in s. 4(2) of the ***Class Proceeding Act***.

[54] The case management judge acknowledged that issues of causation, allocation of fault, limitation defences, and damages would remain for decision following the trial of the common issue. Nevertheless, he concluded the general fitness of silicone implants was an overriding issue; there were no other means for the resolution of the claims of those women with modest claims; and, that greater difficulties would be

experienced in administering separate proceedings. The appellants disagree with all these conclusions.

[55] They submit the case management judge did not undertake the "scrupulous and effective screening" required "so that in the quest for cost effectiveness one does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency." In their view, a proper consideration of the statutory screening criteria in this case can lead only to the conclusion that none of the policy goals of the ***Class Proceeding Act*** would be achieved by the certification order made in this case. At the root of their submission is the view that the severance of the issue of general causation from individual causation is unfair to them.

[56] Appellants' counsel would agree with Professor Boodman's view, *supra,* at 216, that "causation is an important nexus between the substantive and procedural domains of mass tort litigation," which is not yet properly recognized. It is difficult to challenge the premise that a consideration of causation must be central to procedural screening criteria for class proceedings founded in negligence. However, where Professor Boodman argues that considerations of causation allow class actions to be certified to permit a focus on general causation (whether a product is safe for ordinary use by a reasonable person when properly installed), the

appellants argue that considerations of causation should preclude class actions where individual causation (whether the product caused injury to a plaintiff) is central to the resolution of individual claims.

[57] I agree with the case management judge that general causation is fundamental to this case. If silicone breast implants are not proven capable of causing the harm alleged, the litigation will end as it did in ***Palmer*** and ***Privest***. As I noted earlier, the respondent seeks to establish the dubious proposition that silicone breast implants cause atypical systemic disease. She also seeks to prove that silicone breast implants (both silicone-gel filled and saline-filled) rupture so often, cause localized complications so often, and cause disease so often that they are generically so risky to health that no breast implant should ever have been put on the market.

[58] The determination of the risks inherent in silicone gel breast implants, if any, and of whether those risks outweigh the social utility of implants, is the first step in determining whether any manufacturer is negligent. The assessment of the manufacturers' knowledge, based on the state of the art of those risks over time or of a variation of the risks from model to model, is not necessary to that factual determination. Only if the respondent is able to prove that

silicone breast implants are capable of causing the harm alleged does the state of any manufacturer's knowledge of the risks of causing that harm become material.

[59] As I also noted earlier, the knowledge base appears to have been largely common to all manufacturers. If that is so, even the assessment of the manufacturers' knowledge may not require separate proceedings for each manufacturer to determine the nature and extent of its duty.

[60] Only if and when the duty to warn falls to be considered, will it be likely that further subclasses will be required. In her amended statement of claim, the respondent particularized the appellants' negligence to include (at 37):

> 179.l)failing to warn the Plaintiff and/or her physicians of the likelihood that such implants could rupture or bleed; the complications attendant upon rupture or bleed and failing to warn about the inherent dangers from the toxic effects of silicone or polyurethane …

[61] On this issue, the appeal is about whether the chambers judge went beyond the reasonable limits of a case management judge's discretion when he decided it was appropriate to permit a binding general risk assessment to be done at the level of what is generic to all silicone gel-filled breast implants, without regard to alleged material differences among

models not specifically described in evidence proffered by the manufacturers.

[62] The risk assessment has three aspects: (1) what are the risks created by the product? (2) are they capable of causing any of the injuries alleged? (3) do they outweigh any social utility the product may have? If the answer to (1) is "none" or to (2) "no", the product is not established to be unfit, or defective and the litigation will end. If, as seems more likely, some risks are proven capable of causing some injuries, the trial judge will then proceed to the third question and determine whether those risks make the product so dangerous that it should not have been produced and sold. It may be that he will determine that it could be sold with a suitable warning. He might even be able to determine the nature and extent of that warning. What the trial judge will not be able to do at this stage is determine either the nature or extent of any manufacturer's duty or breach of duty. The determination of negligence must await the outcome of a trial where the manufacturers can put forward evidence of the state of their knowledge (actual or imputed) of the risks the trial judge found at the common issue trial.

[63] Viewed from this perspective, I cannot see any reason for interfering with the case management judge's order. The policy goals underlying the ***Class Proceeding Act*** are

efficiency, access to the courts, and modification of the behaviour of wrongdoers. All will be served by the preliminary determination of whether breast implants carry inherent danger and, if so, what the risks are. Individual issues of proximate causation, date of discoverability, allocation of fault, and damages are important but they are consequential to a finding of the risks inherent in breast implants. No persuasive reason was put forward for requiring that those individual issues be determined in the same proceeding as the nature and extent of the risks. Their resolution will be made easier by the resolution of the common issue.

[64] Considerations of efficiency and fairness to all parties underlie the statutory criteria for certification as a class proceeding. I am not persuaded of any unfairness to the appellants or any of the manufacturers in having to respond to allegations their products carry dangers to consumers or in the identification of those dangers before the plaintiffs are called upon to establish the nature and extent of a defendant’s duty, to meet a limitation defence, and to prove proximate cause or the extent of their damages. The possibility that some claims may be barred by a limitations period or that others may require the consideration of negligence by the plaintiffs or third parties, is not a reason

to refuse certification of the common issue. It is equally possible that the determination of the common issue will reduce the number of active claimants as well as the size of some claims.

[65] I would have thought that the proposed risk assessment is precisely the sort of examination manufacturers undertake on a continuing basis, given that they are designing, making, and selling products that are to be inserted in a human body. The task facing them at this first stage of the proceeding should require little more than making available to the court the information on which they rely to make manufacturing and marketing decisions. If material differences among the models become evident during the course of preparation for a common trial, a defendant may apply for a variation of the certification order to create a separate subclass for itself or for decertification.

[66] However, from an individual plaintiff's perspective, a class proceeding is probably the only way she might have a chance to press her claim effectively. The cost of a risk assessment in resources of time and money would burden even the plaintiff with extremely serious injuries. For those with more modest claims the cost would be prohibitive. This may be the reason that despite the willingness of many plaintiffs to

join in a class action, counsel advised only three individual actions have been started in British Columbia.

[67] As with pacemakers in ***Nantais v. Telectronics Proprietary (Canada) Ltd.*** (1995), 25 O.R. (3d) 331 (Gen.Div.), leave to appeal denied (1995), 40 C.P.C. (3d) 263 (Ont. Div. Court), and (1996), 7 C.P.C. (4th) 206 (Ont.C.A.), toilet tanks in ***Chace v. Crane Canada Inc.,*** (1997), 44 B.C.L.R. (3d) 264 (C.A.), and heating panels in ***Campbell,*** *supra*, this case about breast implants seems ideally suited for resolution by a class action, in a multi-staged proceeding, with trials of both common and individual issues.

[68] Baxter Healthcare suggest that individual actions, actively case managed by one judge on the American model, would be more appropriate than a class proceeding. Other counsel suggested individual cases with an appropriate test case would be preferable. These are judgement calls where this court’s deference to the case management judges should be at its highest. I would affirm the certification order.

The Jurisdictional Issue

[69] Jurisdiction involves two concepts: jurisdiction *simpliciter* and *forum (non) conveniens*. The first is a question of law, the second involves an exercise of

discretion. The appellants allege that the case management judge erred in law when he included in both the resident and non-resident classes, women whose claims lack a real and substantial connection with British Columbia. The well-settled test for jurisdiction *simpliciter* requires such a connection between the forum and either the defendant or the subject-matter of the litigation. The appellants do not suggest that British Columbia is an inconvenient forum or that another forum is more appropriate.

[70] The respondent accepts that many of the non-resident class and some of the resident class cannot establish jurisdiction *simpliciter* under a strict application of the real and substantial connection test. She asks this court to relax the traditional approach to claims to jurisdiction, so that the benefits of a class action may be made available to all Canadian residents wishing to have their claims against the appellants resolved in this province. The Attorney-General would have this court restate the test for jurisdiction in class proceedings as a real and substantial connection with the litigation already before the Court.

[71] The only direct connection of any appellant with British Columbia is the sale of a breast implant to women who were implanted in British Columbia. The appellants acknowledge jurisdiction on that basis no matter where a claimant resides.

It appears they did not dispute the Supreme Court's jurisdiction to adjudicate the claims of residents before Mr. Justice Mackenzie. I agree with the respondent that this ground of appeal must fail as regards them because the courts of this province are justified in asserting jurisdiction over residents' claims under the principles laid down in ***Moran v. Pyle,*** [1975] 1 S.C.R. 393.

[72] The issue regarding non-residents without a direct connection to this province is more difficult to resolve.

[73] The respondent is of the view that an extension to these non-residents is explicitly permitted by s. 16(2) of the ***Class Proceedings Act:***

> 16(2). …, a person who is not a resident of British Columbia may, … opt into that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.

One way of expressing the issue on this aspect of the appeal is to ask whether the procedural mechanism of the ***Class Proceeding Act*** permits the Supreme Court to take jurisdiction it would not otherwise be empowered to exercise. The respondent considers that it does and that, in the absence of a challenge to the constitutionality of s. 16(2), this ground of appeal must fail.

[74] The authorities and literature to which we were referred do not address the application of s. 16(2). However, it is

expressed in the same terms as those recommended in 1996 by the Uniform Law Conference of Canada in its ***Uniform Class Proceedings Act***, s. 16(2). The latter has been the subject of some comment insofar as the Legislatures have chosen opting in over opting out. Opting in is seen as having the advantage of "indicating that the non-resident accepts the jurisdiction of the court such that they would be precluded by the doctrine of *res judicata* from later suing or benefitting from a suit brought in another jurisdiction."[1] The equivalent Ontario statute does not mention residency. However, Ontario courts have developed the concept of a 'national' class purporting to bind both resident and non-resident members who have been given reasonable notice of the proceeding and have not opted out: ***Nantais v. Telectronics Proprietary (Canada) Ltd***., *supra*. In refusing leave to appeal, Zuber J. commented at 206 that the effect of an order "remains to be seen", and that the "law of *res judicata* may have to adapt itself to the class proceeding concept." He did not undertake that analysis nor has any court before or since.

[75] The appellants accept on the plain wording of the provision that a non-resident whose claim can meet the requirements of jurisdiction *simpliciter* is entitled to opt in to the proceeding because that person would be a member of the

[1] **Class Actions**, Consultation Memorandum No. 9, Alberta Law Reform Institute, March 2000, at 31

class if she were a resident of British Columbia. Thus, a Newfoundland resident implanted in British Columbia could opt into this class proceeding. This interpretation gives effect to the inclusion in s. 16(2) of the words "… if the person would be, but for not being a resident of British Columbia, a member of the class…" and a purpose to the provision. The respondent takes the view that s. 16(2) is unnecessary for that purpose; a subclass of non-residents with claims with a real and substantial connection to British Columbia could be created without it, as ***Carom v. Bre-X Minerals Ltd.*** (1999), 43 O.R. (3d) 441 (Gen. Div.) illustrates. Thus, the respondent argues, the Legislature must have intended to "allow an extra-provincial subclass to be created for people who would not otherwise be allowed to participate in the British Columbia forum."

[76] Moreover, the respondent submits, the concept of a real and substantial connection should be understood in the context of the procedural innovation to permit mass tort claims by way of class action. In her view, the relevant factors will differ when the wrong alleged is the sale of a defective product to thousands of mobile claimants rather than of one carelessly produced product to a single purchaser.

[77] Finally, and in any event, the respondent submits, a decision on whether the court has jurisdiction over an

individual class member's claim can await a challenge by a defendant in an individual trial. If unchallenged, a woman who opts into a class is likely to be estopped from suing again in her own or another forum.

[78] Mr. Justice Mackenzie remarked at paras. 10 and 11 of his Reasons that the ***Class Proceeding Act*** is procedural in nature and neither seeks to extend the jurisdiction of British Columbia courts beyond its constitutionally recognized limits, nor to define those limits. He acknowledged that the court would not have jurisdiction over the non-resident claims aside from the class proceeding but concluded that the British Columbia court does have jurisdiction *simpliciter* on the subject matter of the action. At para. 16, he posed a question to himself:

> ***Nitsuko***, *supra,* and ***Con Pro***, *supra,* clearly state that this court has no jurisdiction over non-resident claims standing alone. However, those decisions do not address the problem of mass tort claims spreading across provincial lines which raise the same issue of liability. The common issue in this case has already been defined: "Are silicone gel breast implants reasonably fit for their intended purpose?" Does that common liability issue establish a 'real and substantial connection' sufficient to found jurisdiction over claims otherwise beyond this court's jurisdiction?

At para. 18, he answered the question:

> It is that common issue which establishes the real and substantial connection necessary for jurisdiction.

[79] In reaching that conclusion, he had regard for the concerns expressed in ***Amchem Products Inc. v. British Columbia (Workers Compensation Board),*** [1993] 1 S.C.R. 897 by Sopinka J. at 911-912:

> With the increase in free trade and the rapid growth of multi-national corporations it has become more difficult to identify one clearly appropriate forum for this type of litigation. The defendant may not be identified with only one jurisdiction. Moreover, there are frequently multiple defendants carrying on business in a number of jurisdictions and distributing their product or services world wide. As well, the plaintiffs may be a large class residing in different jurisdictions. It is often difficult to pinpoint the place where the transaction giving rise to the action took place. Frequently, there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives.

[80] Similar considerations moved Mr. Justice La Forest to comment in ***Tolofson v. Jensen***, [1994] 3 S.C.R. 1022 at 1048-49:

> As *Morguard* and *Hunt* also indicate, the courts in the various states will, in certain circumstances, exercise jurisdiction over matters that may have originated in other states. And that will be so as well where a particular transaction may not be limited to a single jurisdiction. Consequently, individuals need not in enforcing a legal right be tied to the courts of the jurisdiction where the

> right arose, but may choose one to meet their convenience. This fosters mobility and a world economy.

and at 1049:

> … In Canada, a court may exercise jurisdiction only if it has a "real and substantial connection" (a term not yet fully defined) with the subject matter of the litigation.

[81] This adaptation of the law to the reality of national and international commerce in the interest of comity among provinces and nations is a continuing process, as Mr. Justice La Forest pointed out in ***Morguard Investments Ltd. v. De Savoye***, [1990] 3 S.C.R. 1077 at 1078. He found guidance as to the manner in which a court could properly exercise jurisdiction in Mr. Justice Dickson's opinion in ***Moran***, *supra*. At 1106, he wrote:

> ...[Dickson J.] rejected any rigid or mechanical theory for determining the situs of the tort. Rather, he adopted "a more flexible, qualitative and quantitative test", posing the question, as had some of the English cases there cited, in terms of whether it was "inherently reasonable" for the action to be brought in a particular jurisdiction, or whether, to adopt another expression, there was a "real and substantial connection" between the jurisdiction and the wrongdoing.

[82] At 1109, he dealt with constitutional concerns this way:

> [t]he private international law rule requiring substantial connection with the jurisdiction where

> the action took place is supported by the constitutional restriction of legislative power "in the province." … The restriction to the province would certainly require at least minimal contact with the province, and there is authority for the view that the contact required by the Constitution for the purposes of territoriality is the same as required by the rule of private international law between sister-provinces.

[83] In ***Moran,*** *supra,* Mr. Justice Dickson found a real and substantial connection in the injury caused by the defendant by a flexible application of the test for the location of a tort. At 409, he formulated a rule appropriate to a case of careless manufacture and explained it as follows:

> …where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered the goods. This is particularly true of dangerously

> defective goods placed in the interprovincial flow of commerce.

[84] In my view, this rule is sufficient to justify the inclusion in the resident class of all women resident in British Columbia who allege they are suffering harm from the use of silicone breast implants manufactured and put into the flow of commerce negligently by an appellant. Any manufacturer of breast implants would understand that any injury would follow the user in whom they were implanted into whatever jurisdiction the user might reside from time to time. [85] It might be said that all women who suffer injury from breast implants may opt into the class proceeding because they would all come within the language of s. 16(2). But, as Mr. Justice Mackenzie noted, this procedural provision does not seek to extend the jurisdiction of British Columbia courts beyond their constitutionally recognized limits. Rather, it tells a court that the Legislature accepts, even encourages, a decision to include non-residents in class proceedings as a matter of public policy. This policy makes good sense. Section 16(2) may preclude the court from certifying a national class on an opting out basis, as was done in ***Nantais,*** *supra*. However, it accords with requirements of comity, and with the policy underlying the enactment of legislation enabling class actions to determine the liability of

defendants for mass injury in one forum to the extent claimants may wish and fairness to the defendants may permit.

[86] Jurisdiction *simpliciter* is not a rigid concept, capable of determination only by the strict application of rules. The location of a tort has never been the beginning of the enquiry. Nor is it now. It was an exception to the traditional rules for asserting jurisdiction. In this regard, it is worth recalling Mr. Justice Dickson's brief review of the development of jurisdictional rules in ***Moran****, supra*, at 397. He noted that traditionally jurisdiction rested upon the "physical power and the ability of the Court to enforce any judgment it may render" and thus, normally, on the defendant's presence in the jurisdiction or on his voluntary submission to the Court's authority. Yet, he noted, Canadian and English courts also asserted jurisdiction "in respect of torts committed within the territorial limits of the Court", whatever the residence of the parties.

[87] The justification for claiming or refusing jurisdiction rests upon the principles of order and fairness sometimes called comity. Comity, especially inter-provincial comity, calls for the meshing of the principles of *res judicata*, the rules for the recognition and enforcement of orders, the rules for the issuance of anti-suit injunctions, and the rules for the assumption of jurisdiction. Thus do Canadian courts

respect each other's territorial jurisdiction while ensuring that good sense prevails in the commercial world. In Canada, this meshing requires a provincial court to place reasonable restrictions on its assertion of jurisdiction. A real and substantial connection is the test of that limit. If this test is met, constitutional limits will not be breached as Mr. Justice La Forest explained in ***Hunt v. T & N PLC***, [1993] 4 S.C.R. 289.

[88] The decision to refuse certification in ***Werner v. Saab-Scandia AB***, [1980] C.S. 798 (Que. S.C.); aff'd (19 February 1982), Montreal, 500-09-001005-800 (Que. C.A.), must be viewed in this context. So too, must Master Bolton's opinion in ***Seguin-Chand v. McAllister*** [1992] B.C.J. No. 237 (Q.L.)(B.C.S.C.) that the continuing suffering of damages in British Columbia could not found jurisdiction where the negligence causing the injury and the original injury occurred outside British Columbia. If proper regard is to be had for the principles explained in ***Hunt***, *supra*, the failure of a non-resident (or resident) plaintiff to allege that a cause of action arose in British Columbia cannot be decisive of jurisdiction *simpliciter.*

[89] When regard is had to the considerations underlying the imposition of limits to claims of jurisdiction, I consider that Mr. Justice Mackenzie was right to find jurisdiction

simpliciter had been established. Moreover, British Columbia is an appropriate court for the resolution of the common issue. If, at some point, an appellant forms the view that another court is more appropriate, whether for the claims as a whole or for some of them, it can apply for the appropriate relief under one or more of the provisions (up to and including decertification) of the ***Class Proceeding Act*** designed to ensure the proceedings are fair to all parties. The powers conferred on the case management and trial judges are such that a learned intermediary defence or a causation issue specific to one or more non-residents should be capable of accommodation by way of the certification of a further sub-class or at the individual determination stage. The ***Class Proceeding Act*** presumes good will and cooperation in resolving differences on the part of all parties.

[90] The jurisdictional rules being functional, the values protected by the real and substantial connection test dictate the factors relevant to its application. The fundamental values are fairness to the parties and orderly decision-making. As Mr. Justice La Forest noted in ***Hunt v. T & N PLC***, *supra,* at 325, "the connections relied on under the traditional rules are a good place to start." However, broad principles of order and fairness must prevail. A decision

whether a court has jurisdiction must not depend on a mechanical application of a rigid test.

[91] Some cases will not require a court to move beyond the traditional rules. If a defendant is within the jurisdiction or has submitted to judgment by agreement or attornment or if a wrong has been committed within the jurisdiction, the test will normally be satisfied. This is the result because no injustice results from a court taking jurisdiction in such cases and orderly decision-making within Canada is respected. If a more appropriate forum from the defendant's perspective exists for resolution of the dispute, the court's discretion to decline jurisdiction as a *forum non conveniens* may obviate the need for any decision about jurisdiction *simpliciter*.

[92] Where the traditional rules are not adequate to ensure fairness and order then other considerations will become relevant. One such consideration will be the nature of the subject matter of the action. In this case, the alleged wrongful acts are defective manufacture or failure to warn. When a manufacturer puts a product into the marketplace in any province in Canada, it must be assumed that the manufacturer knows the product may find itself anywhere in Canada if it is capable of being moved. As I suggested earlier in these reasons, it is reasonable to infer that a manufacturer of a breast implant knows that every purchaser will wear that

implant wherever she resides, and that if the implant causes injury then the suffering will occur wherever she resides, and require treatment in that location. By the action of sale, the manufacturer risks an action in any province. In these circumstances, there can be no injustice in requiring a manufacturer to submit to judgment in any Canadian province. The concept of *forum non conveniens* is available to deal with any individual case where a different forum is established as more appropriate. As Mr. Justice La Forest remarked in the passage I quoted from ***Tolofson****, supra*, in some circumstances individuals need not be tied to the courts of the jurisdiction where the right arose, but may choose one to meet their convenience.

[93] The existence of a certified class proceeding cannot be ignored when that action will resolve an issue of fact common to the claims being asserted by those who seek to join it. As Mr. Justice Rehnquist noted in ***Phillips Petroleum Co. v. Shutts,*** 472 U.S. 797 (1985) at paras. 22 and 23:

> …the class action was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the litigation was too great to permit joinder. The absent parties would be bound by the decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest.

The modern class action serves that same purpose, while also permitting the pooling of claims otherwise uneconomical to litigate.

[94] Submissions founded on concern about the scarcity of judicial resources must have regard to the legislative expression of the province's willingness to provide a forum for the resolution of such non-resident claims. Ontario courts interpret the equivalent Ontario legislation as encouraging the determination of common issues on a national opting out basis by a court with a real and substantial connection to the action. The Uniform Law Commission recommends an opting in provision that permits inclusion of non-resident claims if the claimant's residence is the only reason for exclusion.

[95] At the very least, the existence of a certified class proceeding must mean that the connections between the proposed claims and the province must be examined not only from the perspective of the defendants, but also from the perspective of the proposed class of plaintiffs.

[96] In saying this, I do not mean to suggest that a court may assume jurisdiction at a plaintiff's request for her convenience. More than a plaintiff's choice is required. I do suggest that the existence of a certified class action may be that something more. It may, depending on the nature of

the cause of action and the certified common issues, provide a sufficient connection to justify a claim to jurisdiction. So long as the process is fair, there need be little concern at this stage for the interests of a defendant; they are well protected by the doctrine of *forum non conveniens*. The court's concern is to respect constitutional requirements. That concern was at the root of the Supreme Court's decision in ***Morguard***, *supra*, where the distinction between jurisdiction and convenience was drawn clearly for the first time.

[97] The appellants acknowledge the jurisdiction of British Columbia courts to determine the claims of at least those resident and non-resident class members implanted in British Columbia. They are defending the class action. I have found that the British Columbia courts have jurisdiction to determine the claims of all residents. I accept that presence in the jurisdiction for the purpose of the defence of one claim does not create presence in the jurisdiction for the purpose of the prosecution of another independent claim. However, I do not accept that proposition as precluding a court from taking account of that presence for the purpose of determining whether the existence of a certified class action with a common issue provides a real and substantial connection between the province and the subject matter of the claim that

a non-resident seeks to have resolved in the same class proceeding.

[98] The appellants are manufacturers of an allegedly defective product for personal use which they market throughout Canada. Such a person must anticipate the possibility of being haled into any Canadian court. The issue of that product's fitness is common to all purchasers wherever they reside. The Supreme Court has properly accepted jurisdiction over all claims by purchasers resident in British Columbia. The appellants are defending those claims. The Supreme Court has certified an issue common to all purchasers for resolution in a class proceeding. These are compelling reasons for British Columbia courts to accept jurisdiction. British Columbia has more than a little interest in accommodating a national resolution of this dispute.

[99] New types of proceedings require reconsideration of old rules if the fundamental principles of order and fairness are to be respected. To permit what the appellants call "piggy backing" in a class proceeding is not to gut the foundation of conflict of laws principles. Rather, as I have tried to explain, it is to accommodate the values underlying those principles. To exclude those respondents who do not reside in British Columbia from this action because they have not used the product in British Columbia would, in these circumstances,

contradict the principles of order and fairness that underlie the jurisdictional rules. By opting-in the non-resident class members are accepting that their claims are essentially the same as those of the resident class members. To the extent the appellants can establish they are not, they can be excluded by order of the case management or trial judge upon application. So can a class certified in another province, as the Dow Settlement Order in this proceeding illustrates.

[100] For these reasons, I am satisfied Mr. Justice Mackenzie was correct to find that the existence of a common issue of fact constituted sufficient connection to found jurisdiction in this case.

[101] It follows from these reasons that I would dismiss the appeal and the cross-appeal.

"The Honourable Madam Justice Huddart"

I AGREE:

"The Honourable Madam Justice Rowles"

I AGREE:

"The Honourable Madam Justice Ryan"

Reasons for Judgment of the Honourable Mr. Justice Finch:

I

[102] The defendants appeal against certification by a chambers judge in an action under the ***Class Proceedings Act***, R.S.B.C. 1996, c.50 of the following "common issue":

> Are silicone gel breast implants reasonably fit for their intended purpose?

[103] The defendants say the issue is not a proper common issue as contemplated by the Act, and that a class proceeding is not the "preferable procedure" for the fair and efficient resolution of the common issue as defined. The defendants also say the learned chambers judge erred in defining resident and extra-provincial sub-classes as including the claims of persons over which the B.C. Supreme Court has no jurisdiction.

[104] I have concluded that the defendants' appeal should succeed on the first two issues, and that it is not therefore necessary to address the jurisdictional questions.

II

Deference

[105] It is well settled that appellate courts generally defer to discretionary orders where the discretion has been exercised judicially. An appellant bears the burden of showing that the discretion was not exercised judicially, that there was an error in principle, or that the order was clearly wrong: see ***Campbell and Isherwood v. Flexwatt et al.*** (1997), 44 B.C.L.R. (3d) 343 (C.A.).

[106] I have come to the view that in this case the usual appellate deference is not required.

[107] The plaintiff applied for certification of a class action and certification of common issues. The application was argued over five days in March, 1996. When the hearing commenced, counsel for the defendants sought a statement of the specific common issues which the plaintiff proposed to have certified. On the second day of the hearing the plaintiff produced a list of eighteen proposed common issues, which the learned chambers judge appended to his reasons. Those issues related to both silicone and saline implants. Eight of them raised an issue of causation. Three issues related to misrepresentation, one related to duties to warn,

one related to conspiracy, one to the defendants' testing, and one to the state of the defendants' knowledge of the products' potential harmful effects. All but one of these questions go to the issue of negligence, and one further issue raised directly whether the defendants were negligent in failing to ensure that their product was safe.

[108] The list of issues the plaintiff presented also included this:

> No. 12 - Were breast implants fit for their intended purpose?

[109] Argument was also addressed to three issues certified in the "***Bendall/Dante*** litigation" as follows:

1. What information did the defendants have regarding adverse effects of silicone gel breast implants and when was that knowledge available to them?

2. Are silicone gel breast implants likely to cause specific medical conditions, and

3. Were adequate notices of either of the foregoing given by the defendants? (see ***Bendall v. McGhan Medical Corp.*** (1993), 14 O.R. (3d) 374 and ***Dante v. Dow Corning,*** 143 F.R.D. 136 (S.D. Ohio, 1992).

[110] At the conclusion of counsels' submissions on 29 March, 1996, the learned chambers judge reserved judgment.

[111] On 3 April, 1996 he addressed a memorandum to counsel in the following terms:

> If I should conclude that neither the list of 18 questions submitted by plaintiff's counsel nor the 3 issues stated in the ***Bendall/Dante*** certification orders raise "common issues" as required by s.4(1)(c) of the ***Class Proceedings Act***, but that the question submitted by plaintiff's counsel as an addition to the ***Bendall/Dante*** issues does, in a modified form, raise a common issue appropriate for certification, would plaintiff's counsel wish a certification order confined to that single common issue?
>
> The common issue as certified would be:
>
> Are any of the silicone gel breast implants with which members of the class have been implanted reasonably fit for their intended purpose?
>
> I wish to hear the response of counsel for the plaintiff to this question at their earliest convenience. Counsel for the defendants should be advised of the time and date scheduled for plaintiff's counsel to advise me of their position, so that defendants' counsel will have an opportunity to attend.
>
> My decision with reasons will be forthcoming in due course after I have heard from plaintiff's counsel.
>
> The attendance of counsel for the above purpose should be arranged through Ms. Gosney in the Registry.

[112] All counsel re-attended before the chambers judge, and the question proposed by his memorandum was put to counsel for the plaintiff. There was a brief adjournment to provide plaintiff's counsel an opportunity to consider the proposed common issue. Counsel for the plaintiff returned after the adjournment and advised the learned chambers judge that they would accept that issue.

[113] Counsel for the defendants Bristol-Myers Squibb Company and Baxter Healthcare Corporation then both asked the chambers judge for an opportunity to address to him submissions as to the acceptability or sufficiency of the proposed common issue. The learned chambers judge refused this request, and the hearing was adjourned without any further submissions. The chambers judge delivered written reasons on the certification application on 11 April, 1996.

[114] The issue certified is different from any issue on which the parties made submissions. It differs from Question No. 12 on the list of 18 by the addition of the following underlined words:

> Are <u>silicone gel</u> breast implants <u>reasonably</u> fit for their intended purpose?

[115] Question 12 in the list discussed in the application would apparently have applied to both silicone gel and saline

implants. So far as one can tell from the record, it would appear that until the judge's memorandum of 3 April, no party had ever suggested that any one issue in isolation would have been suitable for certification.

[116] Deference to decisions based on the exercise of discretion is premised on the fact that even when all relevant information and considerations are before the court, different judges may exercise the discretionary power in different ways. A discretionary power implies that there is no absolute right or wrong disposition. Provided that the discretion is exercised in a judicial way, deference is accorded in order to achieve finality. This Court has said on many occasions that it is not at liberty to substitute its own exercise of discretion for the discretion already exercised by the judge: ***Creasy v. Sweeny***, [1942] 2 D.L.R. 552, ***Taylor v. Vancouver General Hospital***, [1945] 3 W.W.R. 510, ***Roe, McNeil & Co. v. McNeil***, [1995] B.C.J. No. 2117 (Q.L.); and ***Waruk v. Waruk*** (1996), 83 B.C.A.C. 287, [1996] B.C.J. No. 2282 (Q.L.).

[117] However, because of the way this certification application proceeded we cannot be sure that the learned chambers judge addressed his mind to all of the many considerations put before us as to the appropriateness of the "common issue" he certified, or as to the certification of a

single issue which did not bear on negligence, the principal focus of the case as pleaded. Defence counsel were not given the opportunity to argue against certification of that single issue. Counsel for the plaintiff before us did not suggest that the arguments made to us had been put to the learned chambers judge.

[118] In these circumstances, there is no obligation on this Court to accord to the order appealed from the deference which this Court would ordinarily give to a discretionary order made by a chambers judge in the case management of complex litigation. In my respectful opinion, this court must consider afresh whether the issue certified is a proper common issue, and whether a class proceeding is the preferable manner for resolving the common issue, without according any deference to the decision of the court below.

III

Did the Chambers Judge Err in Certifying the Common Issue?

[119] Section 1 of the ***Class Proceedings Act*** defines “common issues” as meaning (a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts. Paragraph 4(1)(c) makes it a

requirement for certification that the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members.

[120] There are two essential elements of a common issue. First, the answer to the common issue must be capable of application to all members of the class, so that determination of the question in respect of the representative plaintiff is a determination for all class members. Second, the answer to the question must advance the litigation in a legally material way: see ***Campbell v. Flexwatt,*** *supra*, ***Chace v. Crane Canada Inc.*** (1997), 44 B.C.L.R. (3d) 264 at 269 (C.A.) and ***Tiemstra v. I.C.B.C.*** (1997), 38 B.C.L.R. (3d) 377 at 379 (C.A.).

[121] The learned chambers judge held the view that the issue certified met these criteria. He said:

> [41] I am satisfied that the question: Are silicone gel breast implants reasonably fit for their intended purpose? - raises a threshold issue which is common to all intended members of the class who have been implanted with silicone gel breast implants and to the several manufacturers of such implants. If the plaintiff succeeds on this issue, then it moves the class a long way to a finding of liability. Quantum of damages would still have to be individually assessed but s.7(a) of the Act makes clear that individual assessment of damages is not a barrier to certification.
>
> [42] The common issue of fitness would require that silicone gel breast implants would have to be

> considered generically as a group, ignoring differences among the particular models of the various manufacturers. In practical terms, the plaintiff would be required to establish unfitness against the model of silicone gel breast implant which has the strongest claim to fitness. Only as against that standard could the issue be said to be common to all manufacturers and all models. Warnings of risk would be irrelevant if no silicone gel filled breast implants should have been manufactured and distributed, and liability would attach to the unfit product.
>
> [43] To a degree, the common issue will raise the same medical problems of causation and definition that are contained in more specific questions I have rejected. However, the issue will be raised in the context of an assessment of the overall risk, presumably through expert opinion. This should permit some appraisal of the incidence and severity of atypical conditions which may be caused by the silicones involved without requiring precise definition of atypical conditions. Essentially it is the same risk assessment that a manufacturer ought to undertake before putting the product on the market. The difficulties inherent in the assessment of risk are not an excuse for declining to make such an assessment.
>
> (emphasis added)

[122] Consideration of whether a question proposed for certification is a "common issue" must begin with the essential elements of the case to be proven. In a product liability tort claim the plaintiff must plead and prove the following:

1) the defendant owed a legal duty of care to the plaintiff in respect of the product;
2) the product was defective or dangerous;
3) the defendant was negligent in failing to meet the requisite standard of care;

4) the breach of the standard of care caused the plaintiff's injuries; and
5) the plaintiff suffered damage as a result of the defendant's negligence.

[123] It is apparent that the question of fitness for an intended purpose is one which relates to a case in contract. This is essentially a tort action. Only two paragraphs in the Amended Statement of Claim plead the ***Sale of Goods Act*** and breach of contractual warranty. Those two paragraphs are:

> [181] The Defendants, or each of them, warranted, either express or implied, that the breast implants were reasonably fit for their intended use when the fact is that the implants when used in a normal manner and for their intended purpose, caused the Plaintiff's injury. The Plaintiff pleads and relies upon the ***Sale of Goods Act*** R.S.B.C. 1979 and amendments thereto, and in particular Section 18 thereof.
>
> [182] Further, or in the alternative, the Defendants or each of them, designed manufactured and distributed the breast implants in a defective and unsafe condition, and placed the products in the normal stream of commerce with the knowledge and expectation that they would be sold and ultimately used without further inspection of their condition and/or without inspection which would reveal latent defects in the implants, and the Plaintiff pleads and relies upon the ***Sale of Goods Act***, R.S.B.C. 1979 and amendments thereto. The Plaintiff claims damages for breach of a contractual warranty and/or condition as to merchantability and/or quality or fitness for a particular purpose.
>
> (emphasis added)

[124] Those allegations are a very minor part of the whole claim advanced, as set out in the remaining 206 paragraphs of the Amended Statement of Claim.

[125] Moreover, almost all of the 21 issues discussed before the chambers judge on the certification application were tort issues relating to causation, misrepresentation, failure to warn and so on. The fitness issue is a very minor part of the case, but hides within it the very issues of negligence and causation which are at the heart of this litigation.

[126] The learned chambers judge expressly held (at para.50) that any claims in contract are not appropriate for class action determination. On its face, the issue certified raises just such a claim. It focuses on the character of the product, rather than on the conduct of the defendants.

[127] In my respectful view the learned chambers judge erred in certifying the common issue because:

a) it is not possible to determine if the breast implant is unfit without examining the specific product in relation to specific plaintiffs (the common issue certified is not capable of application to all members of the class); and

b) the defectiveness of the product cannot be determined without considering the issue of causation, i.e. did the defects cause the injuries alleged (resolution of a common issue does not advance the litigation in a legally material way).

[128] With respect to the first of these errors, it is clear that the intended purpose of breast implants is breast augmentation, for either cosmetic, prosthetic or other medical purposes. There is no suggestion that breast implants are not fit for those purposes. What is alleged to have rendered them unfit is that "they caused the Plaintiff's injury" (Amended Statement of Claim, para.181) and that they were manufactured and distributed "... in a defective and unsafe condition" (Amended Statement of Claim, para.182). The learned chambers judge recognized (in para.43) that the issue he certified did raise "problems of causation and definition", but he held that the question of fitness could be determined by an "assessment of the overall risk".

[129] The question he posed is theoretical and, in essence, asks "Is it possible that silicone gel breast implants are unsafe or cause injury?" The evidence is that there are something like 80 different models of silicone breast implants, produced by three manufacturers, over a

period of about thirty years. Whether the products were not reasonably fit, in the sense of being unsafe or likely to cause injury, can only be determined by examining specific products in relation to specific plaintiffs. The question cannot sensibly be answered by a simple "yes" or "no". If an implant is held to be unfit, a reason for that conclusion must be given. One cannot decide whether a product is unsafe without deciding why it is unsafe.

[130] The evidence before the learned chambers judge gave rise to three possible issues of defectiveness or dangerousness. The first is whether silicone gel is a toxic substance. The second is whether a silicone implant has a propensity to rupture. The third is whether a plaintiff's objective signs, together with her subjective complaints, support an inference that the implant was unfit or unsafe. None of these issues can be addressed without referring to specific products in relation to specific plaintiffs.

[131] As to the second error, it is not possible to say whether any product is defective without considering the issue of causation: i.e. did the defect cause the injuries alleged? In the context of this litigation, the question of fitness cannot be separated from the issues of causation.

[132] Unfitness in the sense alleged in this case depends on establishing a causal link between the failure, rupture or "bleed" of silicone, and the effect or injury by which the implants' unfitness becomes evident.

[133] The learned chambers judge anticipated these obstacles, to some extent, by ruling that:

> In practical terms, the plaintiff would be required to establish unfitness against the model of silicone gel breast implant which has the strongest claim to fitness. (at para.42)

[134] Implicit in this suggestion are the assumptions that there is one implant with the strongest claim to fitness, that such an implant can be identified in advance of the trial on the certified question, and that a finding that such an implant is fit or unfit can be applied to all implants so that all may be said to be fit or unfit.

[135] There was no evidence before the chambers judge that any one implant had the strongest claim to fitness in terms of being safe or free of defects likely to cause harm. Nor was there evidence that such an implant could be identified in advance in any practical or efficient way. Moreover, if the implant with the "strongest claim" to fitness were, for example, manufactured in 1990, and was found to be fit, one

could not reasonably infer that all implants manufactured in 1970 or in 1980 were also fit, or that members of the class would accept such an inference.

[136] In the plaintiff's factum, counsel argued that the chambers judge's statements about an implant with "the strongest claim to fitness" were *obiter dicta*. I quote:

> [37] The Appellants make much of the Chamber Judge's statement, in the above paragraph, that the Plaintiff must establish unfitness against the implant with the "strongest claim to fitness". If taken literally, the statement would seem to contradict the prior sentence, which stated that the implants must be considered "generically as a group". When read in the context of the whole judgment it is clear that the Chambers Judge was simply speculating on the practical application of the common issue at trial and his statement must be taken as *obiter dictum*....
>
> [38] The Chamber Judge's remark regarding the implant with the "strongest claim to fitness" was made by way of illustration and is not binding on the Trial Judge. If the Plaintiff proves that breast implants "generically as a group" are unfit that would have the effect of proving that the implant with the strongest claim to fitness was unfit. However, that does not mean that the parties must determine which implant has the greatest claim to fitness and then prove that that particular implant is fit or unfit.
>
> [39] At the certification stage of a class proceeding a Chambers Judge is not asked to determine how the plaintiff will prove her case at trial. The Chambers Judge simply certifies the common issue to be tried. The practicalities of how the plaintiff proves her case are determined during the trial process. The Chambers Judge cannot bind

> the Trial Judge regarding the practicalities of proof.

[137] To say that the chambers judge's statement is not "binding" on the trial judge does not advance matters. The chambers judge himself said that "in practical terms" that is how the issue would have to be dealt with. Counsel for the plaintiff did not present us with any other realistic mode of resolving the issue. I do not understand how the plaintiff could prove that breast implants were "generically as a group" unfit by any method other than that proposed by the chambers judge. And, as I have said, I do not see how that course can usefully be followed without going into the issues of causation specific to particular products and individual plaintiffs.

[138] In my view this case is distinguishable from cases such as ***Campbell v. Flexwatt*** and ***Chase v. Crane Canada Inc.*** Firstly, as already mentioned, it is clear that the intended purpose of breast implants is breast augmentation. There is no suggestion that breast implants are not fit for this purpose. The question is really whether the implant caused the alleged injuries. In ***Campbell***, the purpose of the radiant ceiling heating panels (RCHPs) was to heat ceiling materials which in turn heated the rooms below. In ***Chace***, the purpose of the

toilet tanks was to dispose of waste as an essential part of the sewer system. Those products clearly failed to do what they were intended to do. The same cannot be said about breast implants where the unfitness alleged is that the implants caused certain diseases and local complications.

[139] Secondly, in my view, the issue of causation is much more difficult in this case. Various scientific and medical issues as well as the impact of each individual's own medical history must be considered when analyzing causation. As the court noted in ***Chace***, the typical loss was physical damage caused by water, a question capable of routine determination. In the case at bar the chambers judge stated that:

> [t]hese are two main elements of the plaintiff's general case against breast implants – their rupture or failure rate, and the alleged link between silicone and connective tissue disease. There are also complaints of local complications, including scar tissue or capsular contraction around the implant and calcification or hardening of the breast. [para. 5]

These are much more complicated issues, involving a large number of different types of breast implants, than arose in either ***Chase*** or ***Campbell***.

[140] Thirdly, in ***Campbell***, there were only two manufacturers of the RCHPs. In ***Chace***, the toilets all came from the same manufacturer and the same kiln. In each case,

there was really only one product to be tested. In the case at bar, of course, there are at least 80 different models of silicone breast implants produced by three manufacturers over a period of thirty years. This adds another layer of complexity to class proceedings in this case, not present in ***Chace*** or ***Campbell***. Moreover, an answer to the common issue certified in ***Campbell*** and ***Chace*** would be a definitive answer for the whole group of plaintiffs. The same is not true for the plaintiffs in this case. As mentioned above, if the implant with the "strongest claim" to fitness were found to be fit, one could not reasonably infer that all other implants manufactured at any other time were also fit.

[141] So I do not think the issue certified meets either of the two criteria for a common issue. No general answer is possible for all class members based on a determination of the issue in respect of the representative plaintiff and, consequently, the answer to the issue certified will not advance the litigation in a legally material way.

[142] In my respectful view, the learned chambers judge erred in certifying as a common issue the question set out in the first paragraph of these reasons.

IV

Preferability of Class Proceedings

[143] While my proposed disposition of the first issue would lead to a conclusion that the appeal be allowed, I believe it is desirable to address as well the question of whether a class proceeding is the "preferable procedure" for the fair and efficient resolution of the common issue defined by the chambers judge.

[144] The ***Class Proceedings Act*** provides in part:

> **Class certification**
>
> **4** (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> . . .
>
> (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;
>
> . . .
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> . . .
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[145] It is apparent that although an issue's predominance is not essential to the certification of a class proceeding, predominance is an important consideration in deciding whether a class proceeding is the "preferable procedure".

[146] In my respectful view, a class action is not the preferable procedure in the circumstances of this case because issues relating to individual claimants are bound to overwhelm the common issue certified to such an extent that there would be no useful purpose served in trying the common issue. This case is similar in this respect to three cases from American jurisdictions which, although decided on somewhat different rules from the B.C. legislation, I find to be persuasive. They are ***Arch v. The American Tobacco Co. Inc.*** 175 F.R.D. 469, 65 USWL 2832 (E.D. Pa. 1997); ***Castano v. The American Tobacco Co. Ltd. et al*** 84 F. 3d 723; 1996 U.S. App. LEXIS 11815; 34 Fed. R. Serv. 3d (Callaghan) 1167 (5th Cir. 1996); and ***Georgine v. Amchem Products Inc.*** 83 F. 3d 610 (3d Cir. Pa.

1996), 26 Envtl. L. Rep. 21138, 34 Fed R. Serv. 3d (Callaghan) 407 (3d Cir. Pa. 1996).

[147] In the latter case, the court said at 626:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma – a disease which, despite a latency period of approximately fifteen or forty years, generally kills its victims within two years after they become symptomatic. Each has a different history of cigarette smoking, a factor that complicates the causation inquiry. …
> These factual differences translate into significant legal differences. Differences in the amount of exposure and nexus between exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff.

With respect to the predominance requirement, the appeals court held that the single question of the harmfulness of asbestos did not satisfy the requirement. Mass torts were not amenable to class certification, especially those involving long-term mass torts and products liability:

> In the typical mass tort situation, such as an airplane crash or a cruise ship food poisoning, proximate cause can be determined on a class-wide basis because the cause of the common disaster is the same for each of the plaintiffs.
> In products liability actions, however, individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of

> operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case. …
> Although some courts have approved class certification of long-term mass torts, these cases have generally involved the centrality of a single issue. See ***In re "Agent Orange"*** *Prod Liab. Litig.* … (expressing concern over the difficulties of managing mass torts suits but finding that class certification was justified because of the centrality of the military contractor defence) …
> This case, of course, lacks any single central issue. …
> … Even if we were to assume that some issues common to the class beyond the essentially settled question of the harmfulness of asbestos exposure remain, the huge number of important individualized issues overwhelm any common questions. (p.628, 630)

[148] The following points emerge from these cases. A decision regarding the general causation question accomplishes nothing for the individual plaintiffs. The plaintiffs would still have to prove a defect in the defendant's particular product, which is a very individualized inquiry. If the common defect theory failed, the result would be the class breaking up into various subclasses, creating manageability concerns. An inquiry into the predominance issue should include a consideration of how a trial on the merits would proceed. The court must look beyond the pleadings and understand the claims, defences, pertinent facts and applicable law so as to

make a meaningful determination of the certification issues. Exposure to different products, the development of diseases and physical injury and the history of the product use are individual factual differences that transform into significant legal differences. Finally, long-term mass torts have not traditionally been certified as class actions. Those that have been certified have involved the centrality of a single issue.

[149] These considerations apply to this case. Resolution of the general causation question does not advance the claims of the class. The question really contains within it issues of individual causation that must be answered in order to advance the litigation in a material way. The combination of the large number of different types of breast implants coupled with the impact of the individual's use of the implant results in individual issues predominating over common ones. There is no one single central issue that can be answered. Furthermore, when the claims, facts and law are assessed, it becomes clear that the alleged failure of breast implants is not the type of long-term mass tort suitable for certification as a class action.

[150] Moreover, if the implant with the "strongest claim" to fitness were found to be fit, class members implanted with

other models would still be free to pursue claims that their particular model of implant was not fit. All would be free to claim that their particular implant was defective. The proceedings would resolve into inquiries of a primarily individual nature.

[151] In the circumstances, it is difficult to see any real advantage to the class proceeding. Counsel for the plaintiff points to the cases where class proceedings have been successful in providing remedies, and to the difficulties, if not the impossibility, of individual plaintiffs pursing their claims on their own. The success of class proceedings in other cases cannot remove or overcome the difficulties inherent in this litigation. And while one can only have great sympathy for every plaintiff who may have suffered harm from a breast implant those considerations cannot determine the utility of the proposed proceeding. Indeed, a class proceeding may well work to an individual plaintiff's disadvantage, in the circumstances of this litigation, by imposing a time consuming process to try the issue of "general causation" when the results of that process will provide only illusory relief.

[152] This is not a single incident case. In typical mass tort litigation, such as an airplane crash with multiple

victims, the cause of loss for each plaintiff is the same common disaster. Similarly, where multiple claims arise from the manufacture of one defective product as in ***Campbell*** or ***Chace***, or from the circulation of one misleading piece of advice, a single cause of loss may be identified. Such claims are far better suited to class proceedings because resolution of the causation issue will clearly advance the claims of all members of the class.

[153] The same cannot be said here. I can see little real advantage to the proposed proceeding. Its superficial attraction derives from a theoretical question which masks the real questions of causation which will, in any event, have to be addressed.

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[154] In view of my conclusions on the first two issues, it is not necessary to address the jurisdictional issue.

[155] For the reasons expressed, I would allow the appeal and dismiss the application for certification.

"The Honourable Mr. Justice Finch"

Reasons for Judgment of the Honourable Mr. Justice Esson:

[156] I agree with Mr. Justice Finch that this appeal should be allowed and in general I agree with his reasons. However, I wish to add some comments of my own.

[157] My first comment is with respect to the question of the degree of deference to be shown to the decision of the chambers judge. I agree that the judge's refusal to hear counsel on his proposal to certify a single common issue affects that question. The judge apparently concluded, because of the similarity of wording between the twelfth common issue proposed by the plaintiff and the single one proposed by him, that no purpose would be served by hearing submissions from the plaintiffs. For the reasons of Finch J.A., I am respectfully of the view that there was a purpose to be served. There was more to the issue than similarity of wording. The question had to that point been debated in the context of seventeen other more specific proposals. The defendants were entitled to have the opportunity to make known their position in relation to that change. Having regard to all of the circumstances, I agree that it was error to refuse to hear counsel.

[158] However, I am also of the view that, even had that error not been made, this court would be justified under the ordinary rules in setting aside the decision. The usual formulation of the rule is in language such as this:

> An appellate court will not assume to substitute its own discretion for the discretion already exercised by the judge, or otherwise to interfere with such an order, unless it reaches the clear conclusion that the discretion has been wrongly exercised, in that no sufficient weight has been given to relevant considerations, or that on other grounds it appears that the decision may result in injustice: ***Taylor v. V.G.H.***, [1945] 3 W.W.R. 510.

[159] ***Roe, McNeill & Co. v. McNeill*** (25 September 1995), CA016554 (B.C.C.A.) per Cumming J.A.

[160] In my view, this is a case where no sufficient weight was given to relevant considerations. I say that recognizing that this court is, most properly, particularly reluctant to interfere with decisions relating to management of the trial list. As Goldie J.A. said in ***Kinley v. Kohn*** (1995), 58 B.C.A.C. 139:

> This court is reluctant to interfere with the management of trials or with the decision of judges to adjourn or not to adjourn trials. The question of adjournments is largely a matter of discretion and this court will not interfere with the exercise by a trial judge of discretion unless it can be shown that he was clearly wrong in the decision that he made: ***GEAC Canada v. Prologic Computer Corp.*** (11 April 1989), CA010671 (B.C.C.A.).

[161] A decision to certify is, however, radically different from the kind of decision considered in ***Kinley v. Krahn***, where a defendant applied for leave to appeal a decision of the pre-trial management judge to adjourn the trial for only two months rather than the nine months which had been sought. This court has, for the best of reasons, consistently refused to interfere with such decisions. Indeed, parties rarely seek leave to appeal from them.

[162] An application to certify, while involving some exercise of discretion, is at the other end of the discretionary spectrum from an application to adjourn. It requires the judge to apply complex legislation to factual issues which, as in this case, are also complex. Decided one way, the decision brings the action to an end. Decided the other way, it authorizes the proceeding to continue. Such a decision not only has profound consequences for the immediate parties but has potentially serious consequences for many others whose numbers are usually unknown but may be in the hundreds or thousands. In many cases, the decision will also have serious consequences for the court system.

[163] My next point is with respect to para. 43 in the reasons of the chambers judge which is quoted in the reasons

of both Finch J.A. and Huddart J.A. but which for convenience I set out here.

> 42 The common issue of fitness would require that silicone gel breast implants would have to be considered generically as a group, ignoring differences among the particular models of the various manufacturers. In practical terms, the plaintiff would be required to establish unfitness against the model of silicone gel breast implant which has the strongest claim to fitness. Only as against that standard could the issue be said to be common to all manufacturers and all models. Warnings of risk would be irrelevant if no silicone gel filled breast implants should have been manufactured and distributed, and liability would attach to the unfit product.
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> 43 To a degree, the common issue will raise the same medical problems of causation and definition that are contained in more specific questions I have rejected. However, the issue will be raised in the context of an assessment of the overall risk, presumably through expert opinion. This should permit some appraisal of the incidence and severity of atypical conditions which may be caused by the silicones involved without requiring precise definition of atypical conditions. Essentially it is the same risk assessment that a manufacturer ought to undertake before putting the product on the market. The difficulties inherent in the assessment of risk are not an excuse for declining to make such an assessment.

[164] Counsel for the plaintiff, as I understand her position, submits that those are *obiter* comments which can be disregarded. With respect, they appear to me to be the cornerstone of the judge's reasoning and to be very important in illustrating the difficulties which would be faced by a

trial judge in trying to conduct a fair hearing on this question. Given the circumstances of this case, the preliminary task of identifying the model of implant with "the strongest claim to fitness" might well be insoluble - certainly, it would be difficult and complex.

[165] The overall result might well be to turn the trial into a formless and almost interminable hearing of the kind which we have seen all too often in commissions of inquiry where the terms of reference are inadequately defined. The difficulties inherent in the assessment of risk should not be "an excuse for declining to make such an assessment." However, I see them not as an excuse, but as a proper ground for refusing to certify a common issue. Those difficulties, in my respectful view, were given insufficient weight. When given proper weight, they are a ground for refusing to certify in this case. I would allow the appeal.

"The Honourable Mr. Justice Esson"