COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Fakhri v. Wild Oats Markets Canada, Inc.,***
2004 BCCA 549

Date: 20041027
Docket: CA031450

Between:

Helen Fakhri and Ady Aylon
as representative Plaintiffs

Respondents
(Plaintiffs)

And

Wild Oats Markets Canada, Inc.
Carrying on business as Capers Community Markets

Appellant
(Defendant)

Before: The Honourable Madam Justice Prowse
The Honourable Madam Justice Ryan
The Honourable Mr. Justice Donald

E.J. Adair and J.S. Twa	Counsel for the Appellant
D. Klein	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia 13 September 2004
Place and Date of Judgment:	Vancouver, British Columbia 27 October 2004

Written Reasons by:
The Honourable Mr. Justice Donald

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

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] This is an appeal against an order certifying a class action for claims arising from the distribution of food contaminated by the Hepatitis A virus ("HAV").

[2] The appellant alleges that:

(1) the learned chambers judge based her finding that a class proceeding was preferable to individual actions on the mistaken belief that the resolution of the common issues would leave little for individual determination;

(2) the claim for punitive damages ought to have been excluded because it cannot be adjudicated conveniently or in a timely way within the class action; and

(3) those who have settled their claims should have been excluded from the class.

[3] For reasons that follow I would dismiss the appeal. I do not accept that the learned chambers judge misunderstood what could be accomplished by resolution of the common issues; I think that the punitive damages claim can be conveniently

tried in the class process; and it was not wrong to define the class as including all persons affected by the alleged wrongs.

FACTUAL BACKGROUND

[4] The appellant owns and operates three natural food grocery stores and a commissary kitchen for the manufacture of food products sold at its stores.

[5] On 26 March 2002, the Vancouver Coastal Health Authority ("VCHA") notified the appellant that one of its employees at the commissary had been diagnosed with HAV and had been infectious while he worked in the commissary. The next day VCHA issued a news release concerning the possible contamination of the appellant's food products. The release listed the affected items and advised those who had consumed them to seek medical advice immediately if they developed symptoms. The release also recommended those who had consumed the implicated products after 12 March 2002 obtain a shot of Immune Serum Globulin ("ISG"). ISG can reduce the risk of becoming ill with HAV if given within two weeks of infection; it is of little benefit if administered after that time.

[6] VCHA identified eight persons who had become infected with HAV. Approximately 6,500 people received ISG injections.

[7] Broadly speaking, the respondents framed the action in contract, for those who purchased the food products which were or might have been tainted with HAV; and in tort, for those who handled or consumed the food product or had contact with a person who was or might have been infected with HAV. The certification order divides the class into two groups, those who claim to have been infected and those who received an injection. The class description is as follows:

> 2. the class is described as all persons who:
>
> (a) claim to have been infected with Hepatitis A in the months of February, March or April, 2002 as a result of handling and/or consuming food products produced, manufactured, distributed and/or sold by the Defendant that were tainted with the Hepatitis A virus (the "Tainted Food Products"), or having contact with a person who was infected with Hepatitis A as a result of handling and/or consuming the Tainted Food Products;
>
> (b) in the months of March or April 2002, received either an injection of Immune Serum Globulin or Hepatitis A vaccine after handling and/or consuming food products produced, manufactured, distributed and/or sold by the Defendant that were or might have been tainted with the Hepatitis A virus, or having contact with a person who was or might have been infected with Hepatitis A as a result of handling and/or consuming the Defendant's food products.

[8] The order creates a subclass consisting of the purchasers of the products, thereby distinguishing their claims from those in negligence. Paragraph 3 of the order reads as follows:

> 3. there be a subclass of the Class, which subclass is described as all persons who purchased food products produced, manufactured, distributed and/or sold by the Defendant and who:
>
> (a) claim to have been infected with Hepatitis A in the months of February, March or April, 2002 as a result of handling and/or consuming the Tainted Food Products; or
>
> (b) in the months of March or April 2002, received either an injection of Immune Serum Globulin or Hepatitis A vaccine after handling and/or consuming food products produced, manufactured, distributed and/or sold by the Defendant that were or might have been tainted with the Hepatitis A virus;
>
> hereinafter referred to as the "Purchaser Sub-Class";

[9] Seven of the eight persons who were identified as having contracted HAV settled their claims with the appellant. The respondent Helen Fakhri allegedly experienced some symptoms of the virus but is not one of the confirmed group. She has not settled her claim. The learned chambers judge rejected the appellant's submission that because of the settlements, a class no longer exists holding (***Fakhri v. Alfalfa's Canada,***

Inc. (2003), 26 B.C.L.R. (4th) 152, 2003 BCSC 1717 at para. 53) that: "... it is inappropriate to exclude individuals who contracted HAV or were weakly reactive for Hepatitis A from the class".

[10] The order defines the common issues in this way:

> 8. the common issues to be determined in respect of the Class are:
>
> (a) What duty was owed by Capers in the production, manufacture, distribution or sale of food products and to whom was the duty owed?
>
> (b) Was Capers negligent in the production, manufacture, distribution or sale of the food products that were or might have been contaminated with Hepatitis A virus?
>
> (c) Should punitive and exemplary damages be awarded against Capers and if so, in what amount?
>
> 9. the common issues to be determined in respect of the Purchaser Sub-Class are:
>
> (a) Did Capers breach an implied warranty to class members who purchased its food products that those food products were safe and reasonably fit for their intended purpose, being human consumption?
>
> (b) Did Capers breach a statutory warranty to class members who purchased its food products, pursuant to the *Sale of Goods Act*, R.S.B.C. 1996, c. 410?

[11] In finding that a class proceeding was preferable over individual litigation, the learned chambers judge was of the view (at para. 87) that:

> I agree with the plaintiff that the common issues which have been enunciated, i.e. the negligence of the defendant and/or the breach of warranties regarding the fitness of the food products and any causal connection with the damages being claimed by the plaintiffs, are at the heart of this litigation. Resolution of the common issues will either conclude the litigation in favour of the defendant or leave very little for individual consideration in the event that the common issues are decided in favour of the class. The key remaining individual issues will be:
>
> - whether the class member purchased food products from Capers;
>
> - whether the class member did not purchase but came into contact with either food or persons who had contact with the food products; and
>
> - what damages, if any, has the class member suffered as a result of the food products?
>
> [Emphasis added]

RELEVANT ENACTMENTS

[12] The certification is governed by s. 4 of the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50 (the "***Act***"), which provides as follows:

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.
>
> [Emphasis added]

DISCUSSION

[13] The appellant challenges the learned chambers judge's decision on preferability as its first ground of appeal. It submits that she failed to recognize that the issues regarding the standard of care and duty of care are relatively uncontentious and the only issue of real significance is whether in each case the claimant can establish that a breach of the duty caused a loss. That, the appellant argues, will be problematic in the claims made by those who received an injection because they must establish pure economic loss or nervous shock requiring highly individualized inquiries. It is said that the learned chambers judge mistakenly assumed that proof of the cause of action could be established by determination of the common issues when it will be necessary to prove loss in order to make out the complete tort of

negligence. The appellant submits that in deciding that common issues will predominate, the learned chambers judge erred in principle.

[14] Preferability decisions attract a high degree of deference. In ***Hoy v. Medtronic, Inc.*** (2003), 14 B.C.L.R. (4th) 32, 2003 BCCA 316, Chief Justice Finch speaking for himself and Madam Justice Ryan said at para. 38:

> In *Flexwatt* [*Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (C.A.)], this Court recognized that a chambers judge has a broad discretion in determining whether a class proceeding meets the criteria of s.4 of the *Act*. Determining whether a class proceeding would be preferable under s.4(1)(d) is an important aspect of that discretionary power. An appellate court ought not to interfere with the exercise of this discretion unless persuaded that the chambers judge erred in principle or was clearly wrong.
>
> [Emphasis added]

[15] The appellant's argument on the first ground focuses on para. 87 of the chambers judge's reasons which can be found in para. 11 of these reasons. I cannot say that the learned chambers judge ignored the principle that proof of loss is a necessary element in negligence. Nor can I say that it was wrong for her to predict there will be very little left for individual consideration after the common issues are decided. There may be some difficulty in establishing pure economic

loss and mental distress but there are bound to be important features common to all. Most of the members of the class would have suffered anxiety at the prospect of contracting HAV and suffered some expense and inconvenience in obtaining a shot. Some may have suffered an adverse reaction to the shot; the literature on the serum lists a number of side effects and notes that statistically less than 1% of persons immunized experience a reaction.

[16] The appellant argues that in order to prove mental shock, each individual claimant will have to establish a diagnosis of a recognized psychiatric illness. With respect, I do not think it can be said with finality that only psychiatric disorders are compensable when the facts of the present case are considered. This is not a case where the victim witnessed a traumatic event, such as in ***Graham v. MacMillan*** (2003), 10 B.C.L.R. (4th) 397, 2003 BCCA 90. Here the claimants were directly affected by the announcement that they were at risk of having contracted HAV. They suffered a physical disturbance when immunized due to the alleged carelessness of the appellant. I do not presume to decide these matters, I simply raise them to indicate that it is by no means certain that the claimants will be put to individual proof of psychiatric illness.

[17] I refer in this regard to ***Anderson v. Wilson*** (1999), 44 O.R. (3d) 673, 175 D.L.R. (4th) 409 (C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 476, 185 D.L.R. (4th) vii [cited to O.R.]. That case involved a class action on behalf of patients who underwent electroencephalogram tests at the defendant's clinic. They were informed that there may be a link between an outbreak of Hepatitis B and the administration of the tests. The judgment of the Court of Appeal was given by Mr. Justice Carthy who at pp. 679-80 said:

> In the present case it is at least arguable that the defendant's alleged negligence had the foreseeable consequence of a general notice to patients that a test was required to determine if they were infected. It was also arguably foreseeable that some suffering from shock would be occasioned by the notice. When the claimants are limited to those who received the notice and family law claimants it can further be argued that there is no ever widening circle of potential liability created in these circumstances and that there is no policy concern to justify excluding recovery.
>
> Given the uncertain state of the law on tort relief for nervous shock, it is not appropriate that the court should reach a conclusion at this early stage and without a complete factual foundation. It cannot be said, in this case, that it is plain and obvious that the claim for the tort of mental distress standing alone will fail. On the assumption that a legal obligation may exist, this segment of the class proceeding is ideally suited for certification. <u>There are many persons with the same complaint, each of which would typically represent a modest claim that would not itself justify an independent action. In addition, the nature of the overall claim lends itself to aggregate treatment because individual reactions to</u>

> the notices would likely be similar in each case -- fear of a serious infection and anxiety during the waiting period for a test result. If evidence from patients to support such reactions to the notices is necessary, it would probably suffice to hear from a few typical claimants. The balance of the evidence as to liability would relate to the conduct of the clinics, the reaction of the Public Health Authorities and foreseeability issues.
>
> [Emphasis added]

I would respectfully adopt this analysis for the purposes of this case and conclude that no successful attack can be made against the learned chambers judge's finding of preferability.

[18] The major thrust of the appellant's argument is that because each claimant must ultimately prove on an individual basis a loss caused by breach of duty, certification would not provide the benefits intended by the ***Act***. This in my view is not a case like ***Hollick v. Toronto (City)***, [2001] 3 S.C.R. 158, 2001 SCC 68, where the court stated (at para. 32) that "... any common issue here is negligible in relation to the individual issues". In ***Rumley v. British Columbia***, [2001] 3 S.C.R. 184, 2001 SCC 69, the court said at para. 35, referring to ***Hollick***:

> The inquiry is directed at two questions: first, "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, whether the class proceedings would be preferable "in the sense of

> preferable to other procedures" (*Hollick*, at para. 28).

Followed in ***Hoy v. Medtronic, Inc.***, *supra* at para. 39.

[19] With those authorities in mind, I cannot say that the learned chambers judge was wrong in her conclusion which she expressed this way at para. 102 of her reasons:

> The class as defined and the proposed common issues meet the touchstone of the analysis enunciated in *Western Canada Shopping Centres v. Dutton* [[2001] 2 S.C.R. 534] and *Hollick,* i.e. they will enable the court to avoid duplication in fact finding and legal analysis. In my view the common issues identified are at the heart of this litigation and will advance the litigation.

PUNITIVE DAMAGES

[20] The principle objection taken by the appellant to the inclusion of the punitive damages in the certification of the class action is that, in the modern development of the law, the resolution of punitive damages cannot occur with fairness and efficiency within the class process. It is said that since the decision of the Supreme Court of Canada in ***Whiten v. Pilot Insurance Co.***, [2002] 1 S.C.R. 595, 2002 SCC 18, punitive damages can only be considered after other heads have been decided and, since individual liability determinations are likely to be numerous and protracted, resolution of the

punitive damage issue will be indefinitely postponed. Delay and uncertainty conflict with the goals of class proceedings.

[21] The appellant further submits that the principle of proportionality as expressed in ***Whiten*** requires an analysis whether compensation under the conventional heads of damage were sufficient for the case. The court said at para. 74:

> Eighth, the governing rule for quantum is *proportionality*. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation). Thus there is broad support for the "if, but only if" test formulated, as mentioned, in *Rookes* [*Rookes v. Barnard*, [1964] A.C. 1129], and affirmed here in *Hill* [*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130].
>
> [Emphasis added]

[22] The question is whether punitive damages would serve a rational purpose. This cannot be known until the results of all the other claims are known. As to rationality, the Supreme Court of Canada said in ***Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.***, [2002] 1 S.C.R. 678, 2002 SCC 19 at paras. 84 and 85:

> The applicable standard of appellate review for "rationality" was articulated by Cory J. in *Hill*, *supra*, at para. 197:
>
> > Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?
>
> *Whiten* affirms that "[t]he 'rationality' test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of its quantum" (para. 101).

[23] The appellant's argument proceeds largely on the premise that individual assessments will take a long time to resolve. I do not accept that premise. The litigation plan proposed by the respondents would appear to meet most concerns about efficiency. The facts are likely to be similar in most claims and they can be conveniently clustered in just a few categories. Moreover, as was mentioned in ***Sylvan Lake***, *supra*, there are two stages in deciding a punitive damage claim: the first is an assessment of the appellant's behaviour to ascertain whether it is deserving of a punitive response; and the second is an examination of the effect of the appellant's behaviour on the individual class members. The first aspect is a common issue here and I think the case can be advanced in

a just way by deciding this preliminary question in a general way.

[24] In ***Rumley***, *supra*, this Court certified a class action in relation to systemic negligence in the failure to prevent sexual abuse of students at a school for deaf children. The Supreme Court of Canada upheld the certification of the claim for punitive damages noting that the issue will be likely decided as a common, rather than an individual, issue. Likewise in the present case, the punitive damages issue may very well be decided on an overall basis.

[25] A punitive damage claim was also certified in ***Chace v. Crane Canada Inc.*** (1997), 44 B.C.L.R. (3d) 264, 14 C.P.C. (4th) 197 (C.A.).

[26] I do not accept the contention that having to await the disposition of other heads of damages will frustrate the objectives of the ***Act***. As counsel for the respondents argued, it is simply a matter of timing. The ***Act*** provides for flexibility in devising methods for meeting problems like this. The litigation plan can be modified through the course of the action in order to ensure that the case is disposed of within a reasonable time.

SETTLED CLAIMANTS

[27] As mentioned, seven of the eight persons who actually contracted HAV have settled with the appellant. The appellant argues that there is no useful purpose to be served in defining the class so as to include them, when to not exclude them is to run the risk of encouraging settled claimants to question their settlements, thereby prolonging the dispute. This is said to be contrary to the public policy of encouraging the settlement of disputes rather than proceeding to litigation.

[28] With respect, I do not think the learned chambers judge should have excluded the settled claimants from the class. The appellant's exposure is not enlarged. No person who has entered into a valid settlement can possibly expect to derive anything from the class action. If, however, a settlement is set aside, a claimant should be able to participate as a member of the class. I can foresee more difficulty in excluding settled claimants in the class than including them and, accordingly, I would not accede to this ground of appeal.

DISPOSITION

[29] For the foregoing reasons I would dismiss the appeal.

“The Honourable Mr. Justice Donald”

I Agree:

“The Honourable Madam Justice Prowse”

I Agree:

“The Honourable Madam Justice Ryan”