QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2010 SKQB 125**

Date: **2010 03 29**
Docket: Q.B.G. No. 247/2008
Judicial Centre: Saskatoon

BETWEEN:

SEAN SCHROEDER, ALLISTER CURTIS VEINOT, and ELEANORE SMIROLDO, as Litigation Guardian for Eden Bobyk,

Plaintiffs

- and -

DJO CANADA, INC., DJO, LLC, McKINLEY MEDICAL LLC, McKINLEY MEDICAL CORPORATION and CURLIN MEDICAL INC.

Defendants

Brought under *The Class Actions Act*, S.S. 2001, c. C-12.01

Counsel:

David A. Klein, Douglas Lennox and Robert J. Gibbings, Q.C. — for the plaintiffs

Gordon J. Kuski, Q.C. and Amanda Quayle — for the defendants, DJO Canada, Inc. and DJO, LLC

Neil S. Rabinovitch and Peter J. Cavanagh — for the defendants, McKinley Medical LLC, McKinley Medical Corporation and Curlin Medical Inc.

JUDGMENT — POPESCUL J.
March 29, 2010

I. Introduction

[1] This is an application pursuant to *The Class Actions Act*, S.S. 2001,

c. C-12.01, (the "Act") to certify the within proceeding as a class action and to appoint Sean Schroeder ("Mr. Schroeder"), Allister Curtis Veinot ("Mr. Venoit") and Eleanore Smiroldo ("Ms. Smiroldo") as litigation guardian for Eden Bobyk, as the representative plaintiffs.

[2] The plaintiffs allege that the defendants sold them pain pumps, which are disposable devices used for pain relief following surgery, that contributed to a serious adverse reaction known as "chondrolysis". Chondrolysis is a painful and debilitating loss of cartilage in the affected joint. The plaintiffs allege that the defendants were negligent in the design, manufacturing and distribution of the pain pump and, in particular, failed to warn patients, doctors and government regulators about the serious health risk associated with the use of its product.

[3] The plaintiffs' notice of motion for certification proposes that the class be defined as follows:

(i) Persons resident in Saskatchewan and elsewhere in Canada, who used the Defendants' pain pumps and who claim to have suffered injury as the result of such use.

[4] The plaintiffs also seek an order certifying the following issues as common issues:

(i) Whether the defendants' pain pump caused serious adverse effects and, if so, what are the nature and extent of those adverse effects?

(ii) Whether the defendants, or any of them, owed a duty of care to class members?

(iii) Whether the defendants, or any of them, breached a duty of care to

class members and, if so, when?

(iv) Whether class members are entitled to punitive damages at common law?

[5] Additionally, the plaintiffs seek an order defining a subclass of Saskatchewan residents and certifying the following common issues for that class:

(i) Whether the defendants, or any of them, owed a statutory duty under *The Consumer Protection Act*, S.S. 1996, c. C-30.1?

(ii) Whether the defendants, or any of them, breached the statutory duty under *The Consumer Protection Act*, *supra*?

(iii) Whether subclass members are entitled to punitive damages under *The Consumer Protection Act*, *supra*?

[6] Finally, the plaintiffs seek orders directing the manner in which and the time within which the class members may opt out of the class action, approving the form and method of notice to be given to the members of the class to notify them of the certification of the class proceedings, and requiring the defendants to pay the costs of any such notice.

II. Statutory provisions

[7] The requirements for certification are set out in s. 6(1) of the Act:

> **6**(1) Subject to subsections (2) and (3), the court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class;

> (c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;
>
> (d) a class action would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a person willing to be appointed as a representative plaintiff who:
>
> > (i) would fairly and adequately represent the interests of the class;
> >
> > (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
> >
> > (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[8] Section 2 of the Act defines "class" and "common issues" as follows:

> "**class**" means two or more persons with common issues respecting a cause of action or a potential cause of action;
>
> ...
>
> "**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;

[9] The parties are at odds with each other on all aspects of the certification requirements, with the possible exception of the litigation plan criterion (s. 6(e)(ii)) and the conflicts with other class members criterion (s. 6(e)(iii)). With respect to the litigation plan certification requirement, the defendants advise that they are not making the satisfaction of that element an issue at this stage, but request the opportunity to make submissions respecting the litigation plan at some later date, should certification be granted. The defendants have not alleged that the proposed representative plaintiffs are in a conflict of interest.

[10] Therefore, essentially all but two certification requirements are at issue.

III. The Issues

[11] Consequently, the issues to be determined are as follows:

1. Do the pleadings disclose a cause of action? (s. 6(1)(a))

2. Is there an identifiable class? (s. 6(1)(b))

3. Do the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members? (s. 6(1)(c))

4. Would a class action be the preferable procedure for the resolution of the common issues? (s. 6(1)(d))

5. Is there a person willing to be appointed as a representative plaintiff who:

   (a) would fairly and adequately represent the interests of the class; (s. 6(1)(e)(i))

   (b) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; (s. 6(1)(e)(ii)) and

   (c) does not have, on the common issues, an interest that is in conflict with the interests of other class members? (s. 6(1)(e)(iii))

6. Should the Court exercise its discretion and deny the certification application, notwithstanding that the conditions for certification have been satisfied? (*Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46.)

IV. Procedural History

[12] The plaintiffs commenced a proposed class action by statement of claim on February 29, 2008. A notice of motion for certification was filed November 7, 2008, and on November 8, 2008, I was designated to consider that application by the Chief Justice of the Court of Queen's Bench, pursuant to s. 4(2) of the Act.

[13] The defendants, DJO Canada Inc. and DJO LLC (collectively called the "DJO defendants"), applied to join McKinley Medical LLC, McKinley Medical Corporation and Curlin Medical Inc. (collectively, the "McKinley defendants") to be party defendants to the action. They also applied to cross-examine Mr. Schroeder, Mr. Veinot, Ms. Smiroldo and Dr. Barry Vaisler on their affidavits and requested an order requiring Mr. Schoeder, Mr. Veinot and Ms. Smiroldo to deliver to the DJO defendants all pertinent medical documentation. In a judgment rendered May 8, 2009, I refused the DJO defendants' request to join the McKinley group as party defendants to the action, but granted their applications to cross-examine the plaintiff affiants and to require the plaintiffs to disclose pertinent medical information. See *Schroeder v. DJO Canada Inc.*, 2009 SKQB 169, 334 Sask. R. 258.

[14] On June 30, 2009, the plaintiffs chose to add the McKinley group as party defendants and amended their statement of claim to seek relief against not only the DJO defendants but also the McKinley defendants. As a result, the amended statement of claim seeks relief against both the DJO defendants and the McKinley defendants.

V. Overview of the facts

[15] The McKinley defendants manufactured a pump known as the "DonJoy Pain Control Device". The DJO defendants distributed these pain pumps in Canada between January 1, 2004, and December 30, 2008.

[16] A pain pump is a disposable, portable, non-electronic device that systematically infuses anaesthetic through a special catheter implanted into the wound site by the surgeon. The pain pump is sold with an empty reservoir. It is the surgeon that choses the type of medication, such as bupivacaine, ropivacaine or lidocaine, and the rate that the medication is infused into the body. The Application for a New Class II Medical Device Licence, appended as Exhibit "A" to the affidavit Penny Chan, sworn October 30, 2008, provides a more detailed description of the device, as follows:

> The DonJoy Local Anesthesia Kit is a completely disposable, non-electronic device that is designed specifically for pain management applications. The infusion device uses sustained pressure (spring force) to deliver a continuous infusion of medications. The DonJoy infusion device is substantially equivalent to an elastomeric infusion device in its use and performance.
>
> The kit consists of an infuser (either 100-mL or 275-mL), a dedicated flow-rate controlling infusion set (varies from 0.6-mL/hr to 8-mL/hr), a catheter for infusion directly into the surgical site, and convenient accessories and preparation materials to set up the device.
>
> The DonJoy infusion device is designed for single use in the hospital, outpatient, and home care settings. The device is indicated for intravenous, intra-arterial, enteral, subcutaneous and epidural infusion of medications or fluids requiring continuous delivery at controlled infusion rates. The system can also be used for continuous infusion of a local anaesthetic directly into the intra-operative site for postoperative pain management.
>
> The DonJoy infusion device is contraindicated for:
> - Infusion of blood and blood products.
> - Infusion of insulin.
> - Infusion of critical or life-supporting medications whose stoppage, interruption, over-delivery or under-delivery would likely cause serious injury or death.

> - Infusion of any solution that is incompatible with the materials of the infuser or infusion sets.
> - Use of ambulatory regimens by patients who do not possess the mental, physical or emotional capability to self-administer their therapy; or who are not under the care of a responsible individual.

[17] The pain pump's main advantage was that it allowed patients to have continuous pain relief for extended periods of time following surgery, without the side effects associated with systemic narcotic analgesics.

[18] The pain pumps began being sold in Canada on January 1, 2004. For all three of the proposed plaintiffs (in the case of Ms. Smiroldo, her daughter), surgery was performed by the same orthopaedic surgeon in Saskatoon. The plaintiffs allege that the surgeon recommended the use of the pain pump as a pain control device and that he inserted the pain pump catheter into their synovial cavities and filled the pump with anaesthetic.

[19] The plaintiffs all claim that they have developed the condition known as chondrolysis. They claim that the catheter ought not to have been placed in the synovial cavity and that this has caused them serious personal injury, specifically a debilitating loss of cartilage in the joint.

[20] The evidence establishes that there are a total of 29 individuals that wish to participate in the class action, if certified. Of those individuals, 17 allege they developed chondrolysis of the shoulder, while 12 allege they acquired chondrolysis of the knee. One of the 29 individuals lives in British Columbia, and the rest reside in Saskatchewan.

VI. Analysis

(A) Overview of The Class Actions Act objectives

[21] The global objectives of our Act are similar to those of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. In the commonly cited decision of *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, McLachlin C.J., writing for the Court, discussed the objectives of the Ontario Act, as follows:

> 15 The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

[22] It is clear from the above statement that judicial economy, access to justice and ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing (or might cause) are fundamental objectives of the Act. In order to give effect to these fundamental objectives, the Chief Justice of the Supreme Court directs that courts not take an overly restrictive approach but, rather,

interpret class action statutes in a way that gives full effect to the benefits intended by the legislation.

[23] It is also now well established that the onus is on the plaintiff to establish some basis in fact for each of the certification criteria, except for the requirement that the pleadings disclose a cause of action. Smith J. (as she then was) explained this principle as follows at paragraph 36 in *Hoffman v. Monsanto Canada Inc.*, 2003 SKQB 174, [2004] 4 W.W.R. 632:

> 36 Although it is suggested that this would not in all cases be necessary, in the case before the Supreme Court in *Hollick*, as in *Taub*, [(1998), 40 O.R. (3d) 379 (Gen. Div.)] which was cited and relied upon by the Court, the plaintiff was said to have an onus provide "a minimum evidentiary basis" to show whether other members of the putative class shared a common complaint, reflected in the pleadings. This evidence, in *Taub*, was seen to be relevant and necessary to identify and define the scope of the putative class and of common issues. In *Hollick*, the Chief Justice went further, to suggest that the class representative must show "some basis in fact" for each of the criteria for certification except for the requirement that the pleadings disclose a cause of action.

[24] As directed by s. 6(1) of the Act, the Court "shall" certify an action as a class action if the Court is satisfied that the criteria are met. It is now necessary to examine the statutory requirements.

(B) The certification requirements of s. 6 of The Class Actions Act

1. Do the pleadings disclose a cause of action? (s. 6(1)(a))

(a) Test

[25] To satisfy s. 6(1)(a) of the Act, the plaintiffs must establish that they have a genuine or apparently authentic cause of action on the basis of the facts as pleaded and the law that applies. Although in several provinces the "plain and obvious test" is used,

in this province a slightly higher threshold requirement has been adopted. The "plausible basis" test developed by our Court of Appeal can be concisely summarized as follows:

- Assuming the facts as pleaded are true, have the representative plaintiffs persuaded the Court that there exists a plausible basis for supposing the defendants could be liable for the claims of the class?

[26] In *Hoffman v. Monsanto Canada Inc.*, 2007 SKCA 47, 283 D.L.R. (4th) 190 (leave to appeal to the Supreme Court of Canada refused, [2007] S.C.C.A. No. 347 (QL)) at paragraphs 50 and 53, the Court of Appeal elaborated as follows:

> **50** Understood in this light, we are of the opinion Justice Smith correctly identified the essential nature of the matter when she said that, assuming the facts as pleaded are true, the representative plaintiffs must persuade the court that there exists a plausible basis for supposing the defendants could be liable to the claims of the class. This is a way of saying, simply and effectively, that the representative plaintiff has to satisfy the judge that the pleadings disclose an apparently authentic or genuine cause of action on the basis of the facts as pleaded and the law that applies. This also has the advantage of restoring balance to the screening process so far as it extends to the cause of action.
>
> ...
>
> **53** In the case of section 6(a) of *The Class Actions Act*, which calls upon a representative plaintiff to satisfy a judge that the class has an apparently authentic or genuine cause of action, there is in our judgment no more effective and balanced and functionally appropriate way of setting the tenor and tone of the matter than to expect the representative plaintiff to satisfy the judge that there exists a plausible basis in principle and presumed fact for supposing the defendants could be held liable.

[27] Our Court of Appeal determined that one of the objectives of our legislation was to create a screening mechanism aimed at permitting a proposed class action to be certified only where there are "authentic" causes of action. A screening mechanism was considered to be particularly important in Saskatchewan because plaintiffs who

commence proposed class actions in this jurisdiction are protected against an award of costs. Consequently, there is no disincentive to plaintiffs who commence marginal litigation in hope of inducing a settlement from a defendant who wishes to avoid exposure to the enormous costs associated with class action litigation.

(b) Negligence

[28] The plaintiffs allege that the defendants, as manufacturers and distributors of a medical product, owed a duty of care to users of their products to ensure that such products were safe, effective for their intended use and to issue warnings concerning adverse reactions related to the use of such products. The plaintiffs further allege that the defendants breached these duties because they knew, or ought to have known, that pain pumps could cause chondrolysis when injected into the synovial cavity and failed to warn against using the product for that purpose, yet marketed the devices as safe and effective for injection directly into surgical sites.

[29] The plaintiffs also allege that they used the product as marketed and as directed and that this caused them to develop chondrolysis and that they thereby suffered damages.

[30] In this case, the essence of the negligence claim is that the defendants, as manufacturers and distributors of medical products, had a heavy obligation to provide adequate warnings of the product's inherent dangers and potential adverse consequences to doctors and patients and that this duty was breached. This high standard of care has been consistently recognized in this country. In *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, the Supreme Court of Canada held:

> 23 In the case of medical products such as the breast implants at issue in this appeal, the standard of care to be met by manufacturers in ensuring that consumers are properly warned is necessarily high.

Medical products are often designed for bodily ingestion or implantation, and the risks created by their improper use are obviously substantial. The courts in this country have long recognized that manufacturers of products that are ingested, consumed or otherwise placed in the body, and thereby have a great capacity to cause injury to consumers, are subject to a correspondingly high standard of care under the law of negligence; see *Shandloff v. City Dairy*, [1936] 4 D.L.R. 712 (Ont. C.A.), at p. 719; *Arendale v. Canada Bread Co.*, [1941] 2 D.L.R. 41 (Ont. C.A.), at pp. 41-42; *Zeppa v. Coca-Cola Ltd.*, [1955] 5 D.L.R. 187 (Ont. C.A.), at pp. 191-93; *Rae and Rae v. T. Eaton Co. (Maritimes) Ltd.* (1961), 28 D.L.R. (2d) 522 (N.S.S.C.), at p. 535; *Heimler v. Calvert Caterers Ltd.* (1975), 8 O.R. (2d) 1 (C.A.), at p. 2. Given the intimate relationship between medical products and the consumer's body, and the resulting risk created to the consumer, there will almost always be a heavy onus on manufacturers of medical products to provide clear, complete and current information concerning the dangers inherent in the ordinary use of their product.

...

25 In my view, the principles underlying the doctrine of "informed consent" are equally, if not more, applicable to the relationship between manufacturers of medical products and consumers than to the doctor-patient relationship. The doctrine of "informed consent" was developed as a judicial attempt to redress the inequality of information that characterizes a doctor-patient relationship. An even greater relationship of inequality pertains both between the manufacturer of medical products and the consumer and, to a lesser degree, between the manufacturer and the doctor. In contrast to the doctor-patient relationship, where the patient can question the doctor with respect to the risks and benefits of particular procedures and where doctors can tailor their warnings to the needs and abilities of the individual patients, the manufacturer-consumer relationship is characterized primarily by a lack of direct communication or dialogue. This lack of dialogue between manufacturer and consumer creates, as Patricia Peppin notes in "Drug/Vaccine Risks: Patient Decision-Making and Harm Reduction in the Pharmaceutical Company Duty to Warn Action" (1991), 70 Can. Bar Rev. 473, at p. 474, a relationship of complete dependency between manufacturer and patient. She explains the relationship in the following terms:

> The patient is dependent both on the company and on the doctor to provide sufficient information for an informed decision to be made, as well as for treatment to heal the body, prevent a disease or palliate the pain. Dependency characterizes the relationship between vulnerable patient and the experts who exercise control over the patient's bodily fate. The physician's relationship with the pharmaceutical company also exhibits a dependency of the doctor, because of his or her limited pharmaceutical knowledge, on the company's information; but the

> relationship is also one in which the physician is courted through the company's marketing efforts and one in which the doctor is immune from physical harm and vulnerability.
>
> Another element of the context within which the legal principles operate is the widespread use of pharmaceutical products apparently unaccompanied by significant public knowledge of the inherent risks.

A similar observation was made by Robins J.A. in *Buchan v. Ortho Pharmaceutical (Canada) Ltd.* (1986), 12 O.A.C. 361, which involved a suit by a woman against the Ortho pharmaceutical company after that woman had suffered a stroke from the use of Ortho's Novum oral contraceptives. In finding Ortho liable for failing to warn consumers about the risk of stroke inherent in the use of the contraceptives, Robins J.A. made the following observation, at p. 380:

> As between drug manufacturer and consumer, the manufacturer is a distant commercial entity that, like manufacturers of other products, promotes its products directly or indirectly to gain consumer sales, sometimes, as in this case, accentuating value while under-emphasizing risks. Manufacturers hold an enormous informational advantage over consumers and, indeed, over most physicians. The information they provide often establishes the boundaries within which a physician determines the risks of a possible harm and the benefits to be gained by a patient's use of a drug.

[31] The plaintiffs' allegation that the defendants, as manufacturers and distributors of pain pumps, were negligent because they breached the duty of care that they owed to potential pain pump consumers by, among other things, not warning them about the risk associated with injecting anaesthetic into the synovial cavities, is genuine and apparently authentic because it sufficiently asserts a recognized cause of action.

[32] The defendants contend that the plaintiffs' assertions in the statement of claim do not amount to an authentic or genuine cause of action because the pain pumps, in and of themselves, do not cause the chondrolysis – it is the way the pumps are used that causes the alleged problem. Specifically, the defendants contend that it is the post-operative injection of local anaesthetic into the synovial cavity that is the real cause of the alleged cartilage degeneration. In other words, it is the drug and placement of the catheter into the wound site that "causes" the alleged damage – not the pump itself.

[33] In my view, the defendants' argument on this point does not support the proposition that the plaintiffs do not have an authentic cause of action. Obviously, it is not the pump itself that causes the alleged damage, no more so than it is not the gun, but the bullet, that causes a wound – yet it defies common sense to suggest that a gun ought not be considered as a cause of a gunshot wound because it is the projectile that entered the body and caused the immediate damage. It is the combination of the anaesthetic-loaded pump, injected into the synovial cavity, that is allegedly problematic. The plaintiffs allege that the pump was designed, manufactured and intended to be loaded with anaesthetic and then injected into operation sites. These allegations suggest that the defendants knowingly, and/or negligently, held out that the pumps were suitable for the purpose of injecting anaesthetic into the body, including the synovial cavity, when the risk of using the pump in that way was too great.

[34] Whether or not the pain pumps "caused" the chondrolysis or whether it was other factors, or combinations of factors, which were the legal "cause" of the alleged condition, is not an issue that should be determined at the certification stage. The resolution of that issue must occur after the trier of fact has had the benefit of hearing evidence called at trial. At this point in the process, the plaintiffs need only persuade the Court that they have set forth in their claim an apparently authentic or genuine cause of action. I find that the plaintiffs have met that criterion and, with respect to the negligence cause of action, have satisfied the requirements of s. 6(1)(a) of the Act.

(c) The Consumer Protection Act

[35] The plaintiffs have pleaded that the defendants have breached Part III of *The Consumer Protection Act*, S.S. 1996, c. C-30.1 ("CPA"). The plaintiffs contend that Saskatchewan residents affected by the outcome of this class action litigation should be entitled to the enhanced protection afforded by the CPA. Section 64 of the CPA creates

a statutory cause of action. That section reads as follows:

> **64** A person who may reasonably be expected to use, consume or be affected by a consumer product and who suffers personal injury as a result of a breach, by a retail seller or manufacturer, of a statutory warranty mentioned in clauses 48(c) to (f) is entitled, as against the retail seller or manufacturer, to recover damages arising from personal injuries that he or she has suffered and that were reasonably foreseeable as liable to result from the breach.

[36] The requisite elements of this cause of action are:

(a) the plaintiffs are "person[s] who may reasonably be expected to use, consume or be affected by" the product;

(b) the product is a "consumer product";

(c) the defendants are "retail seller[s]" or "manufacturer[s]" of the product;

(d) the defendants breached at least one of the statutory warranties;

(e) the plaintiffs suffered personal injuries, which were reasonably foreseeable.

[37] The defendants argue that the CPA has no application because:

(a) pain pumps are not a "consumer product";

(b) the CPA only applies where a "consumer product" was sold by a "retail seller" and the hospital, which sold the pain pumps to the plaintiffs, was not a "retail seller" within the meaning of the CPA;

(c) the use of a pain pump after surgery does not constitute a "sale"

within the meaning of the CPA; and

(d) the CPA does not apply to transactions outside Saskatchewan.

[38] The relevant provisions fo the CPA are as follows:

39 In this Part:

(a) **"acceptable quality"** means the characteristics and the quality of a consumer product that consumers can reasonably expect the product to have, having regard to all the relevant circumstances of the sale of the product, including:

(i) the description of the product;

(ii) its purchase price; and

(iii) the express warranties of the retail seller or manufacturer of the product;

and includes merchantable quality within the meaning of *The Sale of Goods Act*;

...

(d) **"consumer"** means a person who buys a consumer product from a retail seller and includes a non-profit organization, whether incorporated or not, that has objects of a benevolent, charitable, educational, cultural or recreational nature and that acquires a consumer product from a retail seller, but no person who:

(i) acquires a consumer product for the purpose of resale shall be a consumer respecting that product;

(ii) intends to use a consumer product in a business or who intends to use the product predominantly for business purposes but also for personal, family or household purposes is a consumer respecting that product, except that where goods are consumer products within the meaning of subclause (e)(ii) the individual or the corporation is a consumer for the purposes of this Part;

(e) **"consumer product"**:

(i) means any goods ordinarily used for personal, family or household purposes and, without restricting the generality of the foregoing, includes any goods ordinarily used for personal, family or household purposes that are designed to be attached to or installed in any real or personal property, whether or not they are so attached or installed; and

(ii) includes any goods bought for agricultural or fishing purposes by an individual or by a family farming corporation but does not include any implement the sale of which is governed by the provisions of *The Agricultural Implements Act*;

(f) **"express warranty"** means an express warranty as described in section 45;

...

(h) **"manufacturer"** means a person who carries on the business of assembling, processing or manufacturing consumer products and includes:

(i) any person who attaches his or her brand name or causes or permits his or her brand name to be attached to consumer products;

(ii) any person who describes himself or herself or holds himself or herself out to the public as the manufacturer of consumer products; and

(iii) where consumer products are manufactured outside Canada and the foreign manufacturer of the products does not have a regular place of business in Canada, a person who imports or distributes those products;

...

(l) **"retail seller"** means a person who sells consumer products to consumers in the ordinary course of his or her business but, subject to subsection 50(1), does not include a trustee in bankruptcy, receiver, liquidator, sheriff, auctioneer or person acting under an order of a court;

(m) **"sale"** means a transaction in which the retail seller transfers or agrees to transfer the general property in a consumer product to a consumer for a valuable consideration and includes but is not restricted to:

(i) a conditional sale;

(ii) a contract of lease or hire;

(iii) a transaction under which a consumer product is supplied to a consumer along with services;

and any reference in this Part to "buy", "buying", "bought", "sell", "sold" or "selling" is to be construed accordingly;

...

48 Where a consumer product is sold by a retail seller, the following

warranties are deemed to be given by the retail seller to the consumer:

(a) that the retail seller has a right to sell the product;

...

(c) where the sale of the product is a sale by description, that the product corresponds with the description;

(d) that the product supplied under the contract is of acceptable quality, except that this warranty is deemed not to be given:

(i) respecting defects specifically drawn to the consumer's attention before the contract is made; or

(ii) where the consumer examines the product before the contract is made, respecting defects that examination ought to have revealed;

(e) where the consumer expressly or by implication makes known to the retail seller any particular purpose for which the product is being bought, that the product supplied under the contract is reasonably fit for that purpose, whether or not that is a purpose for which the product is commonly supplied, except that this warranty is deemed not to be given where the circumstances show that:

(i) the consumer does not rely on the retail seller's skill or judgment; or

(ii) it is unreasonable for the consumer to rely on the retail seller's skill or judgment;

...

50(1) For the purposes of subsection (2), **"retail seller"** includes those persons who are excluded from the definition of retail seller in clause 39(l).

(2) Subject to subsection (3), the manufacturer of consumer products is deemed to give to consumers of those products the same statutory warranties respecting those products as the retail seller is deemed to have given pursuant to clauses 48(b) to (h).

(3) A manufacturer of consumer products is liable only for the manufacturer's own breach of the statutory warranties or of any express or additional written warranties that the manufacturer has given to consumers and, without limiting the generality of the foregoing, the application of subsection (2) is subject to the following:

(a) no provision of clause 48(b) applies respecting any security interest that is not created by the manufacturer or any lien, charge or encumbrance not arising as the result of any act or default on the manufacturer's part;

(b) no manufacturer is bound by any description applied by the retail seller to the consumer products without the authority or consent of the manufacturer;

(c) for the purpose of clause 48(d), the consumer is deemed to have notice of a defect if disclosure of the defect was made directly or indirectly to the retail seller and was intended by the manufacturer to reach the consumer and in the normal course of events could reasonably be expected by the manufacturer to reach the consumer;

(d) no provision of clause 48(e) applies where, without the consent of the manufacturer, any consumer product:

(i) is sold by a retail seller to a consumer as being fit for a purpose that is not the ordinary purpose of the product; or

(ii) at the time of sale, is in such a state, age or condition that it is unreasonable for the consumer to conclude that it is fit for the purpose for which it is commonly supplied.

51(1) There is a presumption of breach of warranties by a manufacturer where:

(a) a consumer, a person mentioned in subsection 41(1) who derives his or her property or interest in a consumer product from or through a consumer, or a person mentioned in section 64 brings an action against a manufacturer for breach of one or more statutory warranties set out in clauses 48(d) and (e);

(b) the consumer or person proves the poor quality, malfunctioning or breakdown of the consumer product but cannot prove the exact cause of the poor quality, malfunctioning or breakdown; and

(c) the facts of the case are such that it is reasonable to draw an inference of a breach by the manufacturer of those statutory warranties.

(2) The presumption in subsection (1) can be rebutted by proof that the poor quality, malfunctioning or breakdown of the consumer product was due to a cause not attributable to the manufacturer or that the consumer product was acceptable or fit for the purpose for which it was bought when it went out of the manufacturer's control.

...

55 In any action brought pursuant to this Part against a manufacturer, retail seller or warrantor for breach of a statutory, express or additional written warranty, lack of privity of contract between the person bringing the action and the retail seller, manufacturer or warrantor is not a defence, and the retail seller, manufacturer or warrantor is conclusively presumed to have received consideration.

...

65(1) In addition to any other remedy provided by this Part or any other law in force in the province, a consumer or a person mentioned in subsection 41(1) or in section 64 may recover exemplary damages from any manufacturer, retail seller or warrantor who has committed a wilful violation of this Part.

(2) In an action in which exemplary damages are claimed, evidence respecting the existence of similar conduct in transactions between the manufacturer, retail seller or warrantor and other consumers is admissible for the purposes of proving that violation of this Part was wilful or of proving the degree of wilfulness of the violation.

66(1) No costs shall be awarded against a consumer, a person mentioned in subsection 41(1) who derives his or her property or interest in a consumer product from or through a consumer, or a person mentioned in section 64, who:

(a) brings an action against a manufacturer, retail seller or warrantor for breach of a warranty pursuant to this Part; or

(b) in an action brought by a manufacturer, retail seller or warrantor, defends or counterclaims on the grounds that the manufacturer, retail seller or warrantor has been guilty of a breach of warranty pursuant to this Part.

(2) Subsection (1) applies regardless of whether the consumer or other person is successful in his or her action, defence or counterclaim unless, in the opinion of the court, the action, defence or counterclaim was frivolous or vexatious.

...

70(1) In any action arising pursuant to this Part, proof that a consumer product does not comply with mandatory health or safety standards set under an Act of the Parliament of Canada or an Act of the Legislature or with quality standards set by regulation is evidence that the consumer product is not of acceptable quality or fit for the purpose for which it was bought.

...

[39] The defendants argue that, even on a liberal interpretation of the CPA, the plaintiffs have failed to establish that they have an authentic cause of action because the statutory requirements have not been met. Specifically, the pain pump is not a "consumer product", use of the pain pump in conjunction with surgery is not a "sale", and the

purchase of pain pumps by the plaintiffs was not from a "retail seller". Obviously, if the CPA has no application to the facts pled, there can be no statutory cause of action based upon alleged breaches of statutorily imposed warranties.

[40] The analysis that follows is not intended to be a definitive adjudication on whether or not the statutory prerequisites necessary to access the remedies provided for in the CPA have been met; rather, the function of the Court at this stage is simply to decide whether there is a plausible basis in principle and presumed fact that the defendants could be held liable under the CPA.

(i) Is the "pain pump" a consumer product?

[41] The allegation is that the plaintiffs purchased pain pumps from the hospital so that anaesthetics could be injected into surgical sites as a pain management option. This, in my view, is capable of fitting the plain meaning definition of a "good" used for "personal use". It is certainly plausible that a court could find that the pain pump was a "good" (*i.e.*, tangible item) used for "personal use" (*i.e.*, not for business). This common sense plain meaning fits with the principle that remedial legislation, such as the CPA, is to be given a broad and liberal interpretation. See *Prebushewski v. Dodge City Auto (1984) Ltd.*, [2005] 1 S.C.R. 649, 2005 SCC 28.

[42] However, the defendants argue that the state of the law is such that the plaintiffs' claim falls within the implausible category. The defendants assert that the common sense plain meaning advanced by the plaintiffs ought not be adopted. They argue that medical devices cannot be considered "consumer products". To support this position, and since there is no Canadian jurisprudence in this area, the defendants suggest that this Court ought to adopt the approach taken by American jurists. The defendants argue that the plaintiffs in this case cannot win the "consumer products" argument for the

same reason that American plaintiffs were unable to bring their claims within similar consumer protection legislation.

[43] The *Magnuson-Moss Warranty Act*, Pub. L. No. 93-637 (the "MMA"), is a United States federal law, enacted in 1975, that governs warranties on consumer products. The statute, also remedial in nature, is intended to protect consumers from deceptive warranty practices. Although many consumer products in the United States are not required to have warranties, if one is given, it must comply with the MMA. The MMA contains a definition of "consumer product", which is very similar to that contained in the CPA. The definition of a "consumer product" in the MMA is as follows:

> **Magnuson-Moss Warranty Act**
>
> Section 2301. Definitions
>
> For the purposes of this chapter
>
> (1) The term "consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

[44] In *Goldsmith v. Mentor Corp.*, 913 F. Supp. 56 (D.N.H. 1995), the U.S. District Court ruled that a silicone testicular prosthesis was not a consumer product because it is a device regulated by the *Federal Food, Drug and Cosmetic Act* ("FFDCA"), and devices so regulated are exempted from the definition of consumer products. After arriving at this conclusion, which was based upon the interplay of several statutes, the court then states:

> In the alternative, the court finds that a testicular prosthesis is not a consumer product under the MMA because it is not "tangible personal property ... normally used for personal, family, or household purposes ...."

[45] In *Kemp v. Pfizer, Inc.*, 835 F.Supp. 1015 (E.D. Mich. 1993) (prosthetic heart valve), and *Kanter v. Warner-Lambert Co.*, 99 Cal. App. 4th 780 (2002) (over-the-counter lice treatment), the courts found that the MMA did not apply because the product in question was governed by the FFDCA and therefore, by definition, was not a "consumer product".

[46] The above cases, relied upon by the defendants to support their positions, are not helpful. Firstly, all three cases are decided upon the unique circumstance that the products in question are covered by the FFDCA and, by virtue of that fact, are not eligible to be considered a "consumer product". There is no equivalent circumstance in Saskatchewan.

[47] Secondly, the "alternative" finding in *Goldsmith* is *obiter dictum* and, more importantly in my view, merely states a conclusion without providing any reasoning. Obviously, decisions from another country are not binding on this Court; however, should an analogous case contain compelling reasoning, such a decision may be of persuasive value. After careful review of the "alternative" finding in the *Goldsmith* decision, I am unable to take any guidance from it because it merely states a bald conclusion without analysis.

[48] In the end result, I reject the defendant's contention that the law prevents a finding that a pain pump is a consumer product, and I conclude that the pain pump in question is capable of being considered a "consumer product" within the meaning of the legislation.

(ii) Were the defendants "retail sellers" or "manufacturers"?

[49] Section 39(d) of the CPA defines a "consumer" as one "who buys a consumer product from a retail seller". The defendants argue that the plaintiffs did not

plead that the hospital was a "retail seller" within the meaning of the CPA and that the hospital that charged the patients for the pain pumps was, in fact, not a "retail seller" because hospitals do not fit within the statutory definition of "a person who sells consumer products to consumers in the ordinary course of his or her business". The defendants argue that the business of a hospital is to provide diagnostic services and medical, surgical and obstetrical treatment and point to the definition of "general hospital" found in s. 2(a) of *The Hospital Standards Act*, R.S.S. 1978, c. H-10, to support their position. At best, the defendants argue, providing the pain pump to patients, at a cost to the patient, was merely an "ancillary service".

[50] The defendants urge this Court to conclude that the plaintiffs' statement of claim is fatally defective on this point and that, as a result, the pleadings cannot be considered to contain a genuine or authentic cause of action because there is no prospect that it can succeed.

[51] Even though the plaintiffs were permitted, by court order on September 10, 2009, to amend their claim to allege that the plaintiffs purchased the defendants' pain pumps from the hospital, the defendants contend that the pleadings are still defective because the plaintiffs have not specifically alleged that the hospital was a "retail seller". I find, however, that the absence of an averment that the consumer product in question was sold to pain pump users by a retail seller is not necessarily fatal to the pleadings because the focus of this aspect of the plaintiffs' claim is on the manufacturer – not the retail seller

[52] Section 50(2) of the CPA states, in part, that the manufacturer of a consumer product "is deemed to give to consumers of those products the same statutory warranties respecting those products as the retail seller is deemed to have given pursuant to clauses 48(b) to (h)". Clause 48 is the provision that sets forth the deemed warranties

in cases where a consumer product is sold by a retail seller to a consumer.

[53] Therefore, with the exception of the s. 48(a) deemed warranty (that the retail seller has a right to sell the product), the operation of s. 50(2) of the CPA makes the deemed warranties of a manufacturer the same as those of a retail seller.

[54] Clearly, it will be open to the trial judge to find that both the DJO defendants and the McKinley defendants owe the same statutory warranties as retail sellers because they fall within the definition of "manufacturer" in the CPA. The allegation is that the DJO defendants have attached their brand name to the product as contemplated by s. 39(h)(i) of the CPA. It is also alleged that the McKinley defendants have consistently described themselves as the manufacturer of the pain pump and thus can fit the s. 39(h)(ii) definition. Furthermore, it is alleged that the DJO defendants, as the Canadian importers and distributors of a product made outside of Canada by a manufacturer with no place of business in Canada, are manufacturers within the meaning of s. 39(h)(iii) of the CPA.

[55] The defendants also argue that the plaintiffs' CPA claim is flawed because even if the defendants are manufacturers and are potentially liable to provide statutory warranties, the prerequisites for activating the manufacturer's warranties have not been properly alleged. The defendants contend that there must be, as a condition precedent to accessing the CPA, a "sale" by a "retail seller" to a "consumer". It is only once this is established, so say the defendants, that the manufacturers can be held liable for what amounts to additional statutory warranties. The defendants assert, therefore, that without first alleging and then establishing that a retail sale occurred between a retail seller and a consumer, the deemed warranties of a manufacturer are meaningless.

[56] The plaintiffs respond to this argument by saying that the interpretation

advanced by the defendants is overly technical and does not accord with the intent, spirit and remedial nature of consumer protection legislation. The plaintiffs argue that when a Saskatchewan consumer purchases a consumer product for personal use, that consumer is entitled to enforce statutory warranties against the "seller", the "manufacturer", or both.

[57] In this case, the plaintiffs have established that they purchased the pain pumps from the hospital, and therefore it is certainly conceivable that a court could conclude that, in these circumstances, a hospital is a retail seller. In any event, it is an open question and one best left for the trial judge as to whether it is necessary to establish, as a condition precedent, that a sale between a retail seller and a consumer occurred before the statutory warranties of manufacturers are triggered. The plaintiffs have alleged that they bought the pain pumps from the hospital and that the hospital had obtained the product either directly or indirectly from the defendants. This allegation, at the very least, advances a plausible cause of action that the defendants are manufacturers deemed to have provided statutory warranties.

[58] Accordingly, I find that the plaintiffs have established, to the degree necessary at this stage of the process, that they may be entitled to enforce statutory warranties as against the defendants who, by definition, are alleged to be manufacturers.

(iii) Was there a "sale"?

[59] The defendants argue that the use of the pain pump, postoperatively, can not constitute a "sale" within the meaning of the CPA because the utilization of the pump was only incidental to the surgery itself, which was the primary event. Additionally, the defendants submit that the circumstances cannot be construed as a "sale" because there are compelling public policy reasons why medical professionals ought not be held strictly liable under consumer protection legislation for products used in the context of the

provision of medical services. The defendants rely upon *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, to support their position.

[60] However, a close analysis of *ter Neuzen* reveals that the reasoning in that case does not apply to the circumstances here. The legislation under review by the Supreme Court of Canada in *ter Neuzen* was the *Sale of Goods Act*, R.S.B.C. 1979, c. 370. The Supreme Court held that for the *Sale of Goods Act* to apply, the contract must be primarily for the purpose of selling goods. If the sale of the goods in question was merely incidental to what is primarily a contract for services, the statute does not apply.

[61] The Supreme Court of Canada quoted, with approval, the following passage from G.H.L. Fridman, *Sale of Goods in Canada*, 2nd ed. (Toronto: Carswell, 1979) at 25:

> ... if the primary object of the contract is the transference of property in something which was not originally the property of the "buyer", the contract will be one of sale of goods: but if the primary purpose of the parties is the performance of certain work, or the provision of services, incidentally to which property in goods is to pass from one party to the other, the contract will not be one of sale of goods.

[62] The Supreme Court of Canada held that the sale of tainted semen (infected by HIV) in conjunction with an artificial insemination procedure was primarily a contract for medical services and not primarily a contract for the sale of semen (see *ter Neuzen* at paragraph 68). Accordingly, our high Court held that the warranties in the *Sale of Goods Act*, did not apply because, while the provision of semen was obviously an important component in the artificial insemination procedure, the primary reason the plaintiff went to the defendant gynaecologist was for professional medical services and expertise.

[63] In the CPA, the legislation applicable in this case, there is no requirement that the contract be primarily one for the sale of goods, rather than primarily one for services. Accordingly, the discussion about the distinction is not applicable to the present

circumstances. In the case before me, it matters not whether the sale of the product was the primary purpose of the contract or merely incidental to the contract. In any event, even if the distinction was relevant, the determination of that issue would be best left for determination by the trial judge.

[64] With respect to the public policy argument, I find that it is not necessary to decide that point because the defendants here are alleged to be the manufacturers/distributors of the medical product and not "medical professionals". Accordingly, whether or not there is, or should be, a judicial policy that medical professionals should not be held strictly liable for goods used in the provision of medical services need not be decided here because the defendants are not medical professionals.

[65] Furthermore, barring a definitive decision from an appellate court, the issue of whether public policy should bar the successful prosecution of a claim of this nature should be determined at trial, rather than at the certification stage.

[66] Accordingly, I find that the plaintiffs have sufficiently established that there is a plausible basis to assert that there was a "sale" of the pain pump to the plaintiff consumers.

(iv) The CPA does not apply to transactions outside the province

[67] The defendants argue that the CPA is only applicable to the Saskatchewan subclass. The defendants complain that the plaintiffs' amended statement of claim does not differentiate between the application of the CPA to class members resident in Saskatchewan and those class members who reside elsewhere in Canada.

[68] The law is clear that provincial legislation, such as the CPA, is limited to transactions that occurred within the territorial jurisdiction of Saskatchewan. See s. 69

of the CPA; *Unifund Assurance Co. v. Insurance Corporation of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40, at paras. 51 and 56; and *Pearson v. Boliden Limited*, 2002 BCCA 624, 222 D.L.R. (4th) 453 at para. 46.

[69] Although the plaintiffs' statement of claim does not make a distinction between Saskatchewan residents and non-residents, the application for certification does. The plaintiffs correctly concede that only the Saskatchewan subclass members are entitled to the benefits of the CPA.

[70] For these reasons, it is necessary for a subclass to be created as proposed by the plaintiffs in their certification application. The issue of the subclass is discussed further below.

2. Is there an identifiable class? (s. 6(1)(b))

(a) Test

[71] Section 6(1)(b) of the Act stipulates that a party seeking to have an action certified must satisfy the Court that there is an identifiable class.

[72] Defining the identifiable class serves three main purposes:

(1) it identifies the persons who have a potential claim against the defendant;

(2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and

(3) it describes who is entitled to notice.

See *Sorotski v. CNH Global N.V.*, 2007 SKCA 104, [2008] 1 W.W.R. 386 at para. 40; and

Caputo v. Imperial Tobacco Ltd. (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.).

[73] In *Western Canadian Shopping Centres Inc. v. Dutton*, *supra*, at para. 38, the Supreme Court of Canada described the requirement for an identifiable class as follows:

> 38 ... First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria....

[74] Principles that can be extracted from this passage include:

(a) the class should be clearly defined;

(b) the class definition shall state objective criteria by which members of the class can be identified;

(c) the class definition should be rationally connected to the common issues; and

(d) the class should be defined without elements that require a determination of the merits of the claim.

[75] Other basic applicable principles include the following:

(1) there must be a rational connection between the proposed class definition, the proposed causes of action and the proposed common

issue (see *Hoffman v. Monsanto*, Smith J. at para. 202);

(2) the class must not be unnecessarily broad (see *Hollick v. Toronto (City)*, *supra*, at para. 21);

(3) the Act does not require that the class be defined such that it would be necessary that every class member would, by definition, be entitled to damages should the common issues be resolved against the defendant (see *Western Canadian Shopping Centres Inc. v. Dutton*, *supra*; and *Sorotski v. CNH Global N.V.*, *supra*, at para. 44);

(4) the class should not be arbitrarily under-inclusive or over-inclusive (see *Paramount Pictures (Canada) Inc. v. Dillon* (2006), 29 C.P.C. (6th) 13 (Ont. S.C.J.); and *Hoffman v. Monsanto*, Smith J. at para. 202); and

(5) on a motion to certify or on an appeal, the Court may modify the definition of the class or the common issues, if the Court is of the view that such modification is required to accord with the Act (see *Williams v. Mutual Life Assurance Company; Zicherman v. Equitable Life Insurance Co. of Canada* (2003), 226 D.L.R. (4th) 112 (Ont. C.A.); *Williams v. Mutual Life Assurance Co.; Zicherman v. Equitable Life Insurance Co. of Canada* (2003), 226 D.L.R. (4th) 131 (Ont. C.A.)); and *Wilkins v. Rogers Communications Inc.* (2008), 66 C.P.C. (6th) 251 (Ont. S.C.J.)).

(b) Identifiable class

[76] Paragraph 13 of the plaintiffs' statement of claim states that the plaintiffs bring this action on their behalf and on behalf of:

> ... a class of persons resident in Saskatchewan, and elsewhere in Canada, who used the Defendants' pain pumps and who claim to have suffered injuries as the result of such use.

[77] The plaintiffs' proposed definition of the class, for all intents and purposes, creates two classes. The first class includes persons, resident in Canada, who have used the defendants' pain pump and who claim to have suffered injuries as a result of such use. The second class, a subclass, would include persons resident in Saskatchewan, who used the defendants' pain pump and claim to have suffered injuries as a result of such use. This subclass would be entitled to the benefit of the additional causes of action that may be available to them by virtue of the CPA.

[78] The description of the proposed class and subclass, as drafted by the plaintiffs, appears to fit the criteria of an "identifiable class" and accords with the reasoning of our Court of Appeal in *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, [2009] 5 W.W.R. 228 at paras. 93-103.

[79] The proposed class and subclass are objectively definable by geographic location in that they speak in terms of those residents in Saskatchewan and those residents elsewhere in Canada. The definition then goes on to refine the class to those that have used the defendants' pain pump and those who claim to have suffered injuries as a result of such use.

[80] In *Merck*, *supra*, our Court of Appeal recognized that a solution to the dilemma that a class must not be overly broad, yet not restricted by a definition that

includes an impermissible reference to merit, would be the use of the "claims made" limiter. The plaintiffs in this case have proposed that the class definition would contain the "claims made" limiter which has the effect of excluding those who have no interest in the proceedings, yet does not depend upon whether those claims will be successful. The proposed class definitions in this case are consistent with this reasoning. There is a rational connection between the class (and subclass) proposed, the proposed common issues and the proposed causes of action. The class definitions are not overly broad or unduly restrictive.

[81] The one concern that I have is that the descriptor, "those who used the Defendants' pain pumps", may be somewhat imprecise. It would be better, more certain and less confusing if that part of the definition was amended to read, "who used the Defendants' pain pumps sold under the brand name 'DonJoy Pain Control Device'". Accordingly, I conclude that the s. 6(1)(b) criteria have been met in that the defined class and subclass are objectively clear if amended as I have indicated.

3. Do the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members? (s. 6(1)(c))

(a) Test

[82] Another certification hurdle is that the proposed class action must raise common issues. Section 6(1)(c) of the Act stipulates that the claims of the class members must "raise common issues, whether or not the common issues predominate over other issues affecting individual members".

[83] McLachlin C.J., in *Western Canadian Shopping Centres v. Dutton*, *supra*, provided the following guidance to courts when assessing the common issues requirement:

> 39 ... there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.
>
> 40 ... with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

[84] In order for an issue to be considered a "common issue", it must be a substantial ingredient of each class member's claim and its resolution must be necessary for the resolution of each class member's claim. See *Hollick v. Toronto (City)*, *supra*, at para. 18.

[85] It is not required that all, or even a majority, of the issues of law or fact of the class members be identical, similar or related; the question is whether the members' claims raise some questions of law or fact that are sufficiently similar or sufficiently related to justify a class action. See *Option Consommateurs v. RTO Enterprises Inc.*, [1999] Q.J. No. 2650 (S.C.) (QL), at paragraphs 20-23.

[86] The common issue meets these sufficiency tests if it is an issue of fact or law that is common to all claims and that its resolution would advance the litigation for

(or against) the class. See *Harrington v. Dow Corning Corp.*, [1996] 8 W.W.R. 485 (B.C.S.C.), aff'd 2000 BCCA 605, 193 D.L.R. (4th) 67, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 21 (QL).

[87] In *Sorotski v. CHN Global N.V.*, *supra*, the Saskatchewan Court of Appeal stated, at paragraphs 53 and 54 as follows:

> 53 The facts in *Hollick* reveal a good deal about the manner in which the commonality requirement is to be applied. The proposed class action in that case was on behalf of some 30,000 people living in the vicinity of a landfill site which was alleged to have caused harm through noise and physical pollution. The Supreme Court found the commonality requirement to be satisfied because, for any putative class member to prevail individually, he or she would have to show, among other things, that the defendant emitted pollutants. The Court reached this conclusion notwithstanding that the common issue was merely one feature of the liability equation. In so doing, the Court necessarily accepted that many aspects of liability, as well as the question of damages, would have to be determined on an individual basis after the common issues trial. Nonetheless, it concluded the commonality requirement to have been satisfied.
>
> 54 The reasoning of the certification judge in this case with respect to commonality does not comply with the notion that common issues need not predominate over individual issues and it does not follow the approach reflected in *Hollick*. The judge focused on the various matters that might have to be considered in order to finally resolve questions of liability and damages as they relate to each member of the proposed class. He did not give adequate consideration to the issues common to each member of the class. This was an error of legal principle.

[88] It is with these principles in mind that I will analyse the proposed common issues.

(b) Proposed common issues

(i) Position of the parties

[89] The essence of the claim asserted by the proposed class members is that the

defendants marketed their pain pumps to physicians and hospitals as safe and effective for use by patients after surgery. The plaintiffs contend that the proposed class members used the pain pumps, as directed, after they had undergone shoulder or knee surgery. The pain pumps were set up by the respective patients' surgeons so that local anaesthetic was injected directly into the synovial cavity proximate to the site of the surgery. The purpose of the placement of the pump in this fashion, of course, was to reduce the pain that would be suffered by the patient following surgery.

[90] The plaintiffs assert that there is a problem with using the product as directed. Chondrocytes are cells found in the synovial cavity that help the body to repair, regenerate and form new cartilage. The plaintiffs allege that local anaesthetics can be toxic to chondrocytes. The plaintiffs also contend that when the anaesthetic is injected into the synovial cavity so that a sustained dose of the anaesthetic is administered to the cartilage, the chondrocytes are killed, which prevents regeneration of the cartilage. This loss of cartilage is called "chondrolysis". This condition, which has loss of cartilage as a common characteristic, results in premature destruction of the affected joint because the joint, unmediated by the cartilage, will grind bone on bone, which, not surprisingly, can result in functional disability.

[91] The defendants contend that its pain pumps do not "cause" chondrolysis. They say that any adverse consequences suffered by any patient that used the pump:

> 110. ... depends on a host of individualized factors including but not limited to the decisions by the surgeon as to where the catheter from the pain pump was inserted in the surgical site, the type of pain medication loaded into the pain pump, the dosage of medication, including the size of the pain pump used, the duration the pain pump was used, and the individual class member's physiology and risk factors.... [Memorandum of Fact and Law of DJO defendants]

The defendants further allege that resolution of the common issues proposed by the

plaintiffs would do nothing to move the litigation forward. This is because, the defendants say, a conclusion that patients who used the pain pumps developed chondrolysis does not advance an overall determination of liability because there are a myriad of other reasons why any given class member may suffer chondrolysis.

(ii) Whether the defendants' pain pump caused serious adverse effects and, if so, what are the nature and extent of those adverse effects?

[92] The defendants point out that the first proposed common issue, as submitted by the plaintiffs, is overly broad. The issue, as framed, speaks in terms of the pain pumps having "caused serious adverse effects", which could cover a variety of adverse outcomes which may, or may not, be relevant to the individual claims of potential class members.

[93] I agree with the defendants' submission respecting their view that the issue as proposed is overly broad in that it alleges "serious adverse effects", which is a very expansive and nebulous assertion not amenable to designation as a common issue. For example, patients may have suffered nausea, upset stomach, infection in the insertion site, etc. These types of adverse effects are very patient-specific. The plaintiffs' claim is focused primarily on the alleged serious adverse consequence of chondrolysis. Anything beyond that consequence makes the issue too individualistic such that it would remove it from the realm of a "common issue". Furthermore, the statement of claim, as drafted, focuses on situations where the pain pump was inserted directly into the synovial cavity. This is a very specific and precise allegation and much more amenable to a common issue determination than is the overly broad question of whether the pumps caused "serious adverse effects" and, if so, "the nature and extent of those adverse effects".

[94] In my view, the real issue disclosed by the pleadings and the material filed in support of, and in opposition to, the certification application is this: Does the DonJoy Pain Control Device cause chondrolysis when placed in the synovial cavity of a knee or

shoulder following surgery?

[95] Such a question ought to be able to be answered. The analysis of the question, as reframed, involves a determination by a trier of fact as to whether the "pump" is the "cause" of the chondrolysis. If the answer to that question is "yes", the litigation has been significantly advanced. If the answer to that question is "no", the litigation is effectively put to an end.

[96] It is an established principle that a court, on a motion to certify, has the authority to modify the definition of a common issue if the court is of the view that such modification is required to accord with the Act. Accordingly, I find that the first issue sought to be certified as a common issue is too broad. However, when appropriately modified, as indicated above, it is, in my view, a proper common issue, the determination of which would sufficiently advance the litigation.

(iii) Whether the defendants, or any of them, owed a duty of care to class members?

[97] In the event that the first common issue is determined in favour of the proposed class members, it is then necessary for them to establish that they were owed a duty of care and that the duty of care was breached in order to successfully establish the tort of negligence. The class members would be, as already discussed, those patients who had shoulder or knee surgery, have used the defendants' pain pump and have claimed that they have suffered chondrolysis. It is trite law to state that in order to successfully prosecute a claim in negligence, the plaintiffs must establish that the defendants owed the plaintiffs a duty of care. See *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.). In basic terms, the question to be determined in this context is whether the alleged harm in question was reasonably foreseeable and whether the relationship between the plaintiffs and defendants were of sufficient proximity or neighbourhood to warrant the

imposition of liability. If a *prima facie* duty of care is found by this analysis, a second step analysis is then required to consider residual policy issues that might suggest that liability be denied. See *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79; and *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80.

[98] In my view, the determination of the question of whether the defendants owed a duty of care to persons who used the product that it manufactured and/or distributed would significantly advance the litigation. The determination of this issue would apply to all class members. Any and all arguments as to why the defendants ought not be said to owe the users of their product a duty of care would pertain to all the members of the class. This is a substantial and necessary element to the resolution of each class member's claim. Resolution of this issue would significantly advance the action in a legally material way.

[99] Accordingly, I find that the common issue respecting duty of care, as framed by the plaintiffs, is an appropriate common issue.

(iv) Whether the defendants, or any of them, breached a duty of care to class members and, if so, when?

[100] The next question sought to be designated as a common issue relates to whether the defendants breached a duty of care to the proposed class members. The defendants argue that such an issue cannot be properly classified as a common issue because the determination of the issue may not be the same for all class members. The defendants suggest that in order to determine whether the conduct of the defendants was unreasonable and, therefore, in breach of their duty of care to the proposed class members, it may be necessary, among other things, to consider what the defendants knew and when they knew it. The issue of whether or not any of the defendants breached its duty of care to any of the class members could, at least theoretically, hinge on the date the

defendants acquired certain knowledge. The result of the determination of this question could vary depending upon the precise date that the pain pump was used by each particular patient. For example, it is possible that the evidence could reveal that, initially, the defendants had no valid reason to believe that their pain pumps were capable of causing chondrolysis if used to inject anaesthetic into the synovial cavity; however, this innocent state of mind could be transformed to a blameworthy state of mind if the defendants received (or should have received) information that warranted a change in utilization directions or justified publication of an enhanced warning. It may be possible, therefore, that claims arising prior to the point when the defendants acquired or should have acquired knowledge of problems associated with the pain pump would not give rise to a finding that there was a breach of the duty of care, while claims arising after the point where they acquired or ought to have acquired knowledge of pump-related problems might lend itself to a finding that there was a breach of the duty of care.

[101] While this element makes the determination of this breach of duty question less clear cut, from a certification perspective, then the more easily categorized issue of whether there was a duty owed to the plaintiffs, I nonetheless conclude that this breach of duty question, too, is appropriately characterized as a common issue.

[102] The pleadings and affidavit material filed on the certification application state that the defendants obtained a license from Health Canada to sell the impugned pain pumps in this country commencing January 1, 2004, and that the license remained in effect until it was cancelled by the defendants on December 30, 2008. Therefore, there is a specific and finite period of time within which the alleged causes of action arose. Should there be an adjudication on the merits, it would be open to the trier of fact to conclude, with respect to the knowledge issue, that:

(a) throughout this period of time, the defendants had not breached

their duty of care; or

(b) throughout this period of time, the defendants had breached their duty of care; or

(c) the defendants initially had not breached their duty of care but, after a certain point in time, they gained knowledge (or ought to have gained knowledge) which, from that point forward, amounted to a breach of their duty of care.

[103] The first two scenarios are conducive to a common issue determination. However, what about the third?

[104] In my view, notwithstanding that there is a possibility that there could be a finding, with respect to the knowledge issue, that initially there was no breach of the duty of care but that, after the point in time where the defendants gained knowledge or ought to have gained knowledge, a time came when the defendants breached their duty of care to some class members, the issue is properly designated a common issue. In the event of a bifurcated finding, there would be a precise date that could be determined to be the date when the line was crossed from "no breach of duty" to a "breach of duty". Class members whose surgery was before such date, arguably, would fall in a category of class plaintiffs that were unable to prove a breach of duty, while those whose surgery was after the date would, arguably, be able to establish a breach of the duty.

[105] Whether such evidence exists and whether or not, if it does, that such evidence would make a difference to the final determination is unknown. This is, at this point, a theoretical exercise.

[106] The difficulty with this third scenario, as pointed out by the defendants, is

that all of the class members would not achieve the same outcome. Those class members who used the pain pump before the time that the defendant's mindset crossed the culpability threshold may be unsuccessful in establishing their claims, while those who used the pain pumps after the relevant point in time would have been found to have established a necessary ingredient of their claim. The defendants contend that such an outcome flies in the face of the principle that before an issue can be properly found to be a common issue, it should be a substantial ingredient of each class member's claim and the determination of that issue should be necessary to the resolution of each member's claim.

[107] Notwithstanding the fact that it is theoretically possible that there could be a bifurcated outcome in the way argued by the defendants, I am satisfied that the breach of duty of care question is properly designated as a common issue. There are several reasons for this conclusion.

[108] Firstly, to refuse to certify an issue as a common issue whenever the possibility exists that the mindset of a defendant could have materially changed during a relevant period of time seems unfair and not in keeping with the spirit, intent and objectives of the Act.

[109] Secondly, the time under examination is precise and relatively brief. It is not a stretch to imagine that a trial judge, with the necessary evidentiary basis before her, could determine the date when a line was crossed from "no breach of duty" to "breach of duty". It would then be relatively easy to separate, if necessary, the class members' claims according to the relevant date.

[110] Lastly, and perhaps more importantly, the principle that an issue should only be considered to be a common issue if its resolution determines a substantial

ingredient of each class member's claim is not offended. The resolution of the breach of the duty of care issue is undoubtedly a substantial ingredient of each class member's claim. The determination of that issue would resolve a significant aspect of each member's claim – albeit in the case of a bifurcated finding, in alternate ways. The class members, although obtaining different results would still have their claims determined and the determination of those claims would not involve a conflict of interest among the class members.

[111] For these reasons, I conclude that whether the defendant breached the duty of care owed to pain pump users is a common issue. The answer will advance the litigation significantly. Either all, none or a specifically identifiable portion of the group of plaintiffs' class could be found to have established a breach of duty. Such a finding, in my view, advances the litigation, albeit perhaps positively for some class members and negatively for others.

[112] Accordingly, I conclude that the third issue, as drafted by the plaintiffs, is appropriate to be certified as a common issue.

(v) Whether class members are entitled to punitive damages at common law?

[113] The plaintiffs submit that the question of punitive damages be designated as a common issue. The defendants submit that it is inappropriate to certify the punitive damages question as a common issue because to do so would involve making a determination on punitive damage in a vacuum. The defendants further submit that the question of whether punitive damages are available in this case and, if so, in what amount depends on numerous individualized questions, including the harm caused to each proposed class member, the vulnerability of each proposed class member, and whether compensatory damages are insufficient to accomplish the objectives of punishment,

deterrence and condemnation. The defendants submit that the quantum of punitive damages cannot be determined until after the Court has determined the extent of each proposed class members injuries and the damages to which each proposed class member is entitled. The defendants rely upon *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18, at para. 94, to support their position. That case does not involve a class action proceeding; rather, it deals with the issue of whether a trial judge gave a jury adequate guidance on how to assess punitive damages. As a result, it does not address the question of when punitive damages ought to be found to be a common issue in a class action proceeding.

[114] The considerations and principles involved in assessing a punitive damages claim were succinctly summarized by the Supreme Court at paragraph 94 in *Whiten*, *supra*:

> 94 To this end, not only should the pleadings of punitive damages be more rigorous in the future than in the past ... but it would be helpful if the trial judge's charge to the jury included words to convey an understanding of the following points, even at the risk of some repetition for emphasis. (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to

> accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[115] There have been numerous cases where courts have concluded that whether a defendant ought to be held liable to pay punitive damages constitutes a common issue. See *Bondy v. Toshiba of Canada Ltd.* (2006), 39 C.P.C. (6th) 339 (Ont. S.C.J.); *Boulanger v. Johnson & Johnson Corp.* (2007), 40 C.P.C. (6th) 170 at para. 48 (Ont. S.C.J.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 72 (C.A.), rev'd (2003), 65 O.R. (3d) 492 (Div. Ct.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50 (QL); *Healey v. Lakeridge Health Corp.* (2006), 38 C.P.C. (6th) 145 at para. 103 (Ont. S.C.J.); *Heward v. Eli Lilly & Co.* (2007), 39 C.P.C. (6th) 153 at paras. 97-98 (Ont. S.C.J.), leave to appeal granted, (2007), 45 C.P.C. (6th) 309 (Ont. S.C.J.), appeal dismissed, (2008), 295 D.L.R. (4th) 175 (Ont. Div. Ct.); *Dalhuisen (Guardian at litem of) v. Maxim's Bakery Ltd.*, 2002 BCSC 528, [2002] B.C.J. No. 729 at para. 5 (QL); and *Chace v. Crane Canada Inc.* (1997), 101 B.C.A.C. 32 at paras. 22-27, aff'g (1996), 26 B.C.L.R. (3d) 339 (S.C.).

[116] In *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69 at para. 34, McLachlin C.J., speaking for the Supreme Court of Canada, had the following to say about the certification of the issue of punitive damages:

> 34 As noted above, Mackenzie J.A. certified as common not only the standard-of-care issue but also the punitive damages issues. Here, too, I agree with his reasoning. In this case resolving the primary common issue – whether JHS breached a duty of care or fiduciary duty to the complainants – will require the court to assess the knowledge and conduct of those in charge of JHS over a long period of time. This is

> exactly the kind of fact-finding that will be necessary to determine whether punitive damages are justified: see, e.g., *Endean*, [(1997), 148 D.L.R. (4th) 158 (B.C.S.C.)], at para. 48 ("An award of punitive damages is founded on the conduct of the defendant, unrelated to its effect on the plaintiff."). Clearly, the appropriateness and amount of punitive damages will not always be amenable to determination as a common issue. Here, however, the respondents have limited the possible grounds of liability to systemic negligence – that is, negligence not specific to any one victim but rather to the class of victims as a group. In my view the appropriateness and amount of punitive damages is, in this case, a question amenable to resolution as a common issue: see *Chace*, *supra*, at para. 30 (certifying punitive damages as a common issue on the grounds that the plaintiffs' negligence claim was "advance[d] ... as a general proposition" rather than by reference to conduct specific to any one plaintiff).

[117] As in *Rumley*, *supra*, the plaintiffs' claim asserts that the design, testing, manufacturing, marketing and sale of the pain pumps showed a marked disregard for public safety. The allegation is not specific to any individual plaintiffs in the class. It is advanced as a general proposition as to how the defendants marketed their product and is not specific to any one plaintiff.

[118] In my view, the appropriateness of punitive damages is conducive to resolution as a common issue. The alleged negligence is systemic and the punitive damages aspect would apply to the class of pain pump users as a group.

(vi) *Common issues relating to* The Consumer Protection Act

(A) *Whether the defendants, or any of them, owed a statutory duty under* The Consumer Protection Act*?*

(B) *Whether the defendants, or any of them, breached the statutory duty under* The Consumer Protection Act*?*

(C) *Whether subclass members are entitled to exemplary damages under* The Consumer Protection Act*?*

[119] The plaintiffs also propose that the subclass of Saskatchewan residents should be entitled to have their cause of action, brought under the CPA, advanced by determination as a common issue.

[120] In my view, for the same reasons outlined above with respect to the other already discussed common issues, the common issues sought to be determined under the CPA are also appropriate common issues. Specifically, do the defendants owe the Saskatchewan subclass members a duty of care under the CPA, have they breached that duty of care, and are statutory exemplary damages warranted?

[121] Arguably, these common issues are even more amenable to resolution by determination of the common issues because s. 51 of the CPA reverses the onus of proof – the focus of the CPA is on the defendants' conduct – and it is up to them to prove that their product was safe.

[122] Consequently, I am satisfied that the common issues proposed by the plaintiffs are, in fact, appropriate common issues to be determined in a class action proceeding.

[123] It should be noted that the CPA uses the term "exemplary damages" rather than the term "punitive damages", and therefore it is more appropriate to use "exemplary damages" as the term used to frame the common issues question.

(vii) Individual issues

[124] The defendants have focused significant attention on the fact that each potential plaintiff's injury and cause of injury is specific and is dependent on a host of individualized factors, including but not limited to:

- the individual's medical history;

- the surgeon's decision on where the catheter to the pain pump was inserted into the surgical site;
- the surgeon's choice of medication;
- the surgeon's choice of the dosage of the medication;
- the size of pain pump used;
- the duration the pain pump was used; and
- the class member's physiology and risk factors.

[125] This appears to be a common argument often raised by defendants in medical product litigation. It is recognized, and conceded by the plaintiffs, that there are always individual issues in such cases. However, the presence of individual issues is not a bar to certification.

[126] As mentioned previously, s. 6(1)(c) of the Act mandates the Court to determine whether the claims of the class members raise common issues "whether or not the common issues predominate over other issues affecting individual members".

[127] Additionally, s. 29 of the Act provides a procedural framework to resolve individual issues following a common issues trial.

[128] The numerous individual factors that could affect the issue of causation as it pertains to each individual plaintiff is undoubtedly a live issue. However, those considerations do not overwhelm or diminish the advantages to be achieved from a single trial of common issues. A determination of the common issues referred to above would, in my view, resolve many of the most contentious issues relating to the defendants' liability in favour of the class of plaintiffs, or it would terminate the litigation.

(viii) Common issues conclusion

[129] Therefore, for the reasons indicated above, the following issues are properly certifiable as common issues:

1. Does the DonJoy Pain Control Device cause chondrolysis when placed in the synovial cavity of a knee or shoulder following surgery?

2. Whether the defendants, or any of them, owed a duty of care to class members?

3. Whether the defendants, or any of them, breached a duty of care to class members and, if so, when?

4. Whether class members are entitled to punitive damages at common law?

5. Whether the defendants, or any of them, owed subclass members a statutory duty under *The Consumer Protection Act*?

6. Whether the defendants, or any of them, breached any of the statutory duties owed to subclass members under *The Consumer Protection Act*?

7. Whether subclass members are entitled to exemplary damages under *The Consumer Protection Act*?

4. Would a class action be the preferable procedure for the resolution of the common issues? (s. 6(1)(d) of the Act)

(a) Test

[130] The Act requires that, before a proposed class action be certified, the Court must be satisfied that a class action would be the preferable procedure for the resolution of the common issues.

[131] I note at the outset that the Act speaks in terms of a "preferable procedure" as opposed to a "necessary procedure". This observation was also made by the British Columbia Court of Appeal in *Nanaimo Immigrant Settlement Society v. British Columbia*, 2001 BCCA 75, 149 B.C.A.C. 26.

[132] In assessing this statutory requirement, I am guided by the comments of McLachlin C.J. in *Hollick v. Toronto (City)*, *supra*, where she stated at paragraph 27:

> 27 ... The parties agree that, in the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behaviour modification: see also *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (2d) 453 (Div. Ct.) ....

Then at paragraph 28, McLachlin C.J. states:

> 28 The report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": *Report of the Attorney General's Advisory Committee on Class Action Reform*, [Ministry of the Attorney General (February 1990)], at p. 32. In my view, it would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and manageable method of advancing the claim" without looking at the common issues in their context.

Then at paragraph 30, McLachlin C.J. states:

> 30 The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues "predominate" over the individual issues: see *Federal Rules of Civil Procedure*, Rule 23(b)(3) (stating that class action maintainable only if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"); see also *British Columbia Class Proceedings Act*, s. 4(2)(a) (stating that, in determining whether a class action is the preferable procedures, the court must consider "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members"). I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General's Advisory Committee put it, the preferability requirement asks that the class representative "demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings" (emphasis added): M. G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act*, 1992 (1993), at p. 27.

[133] It is apparent from the jurisprudence, including *Hollick*, *supra*, that a number of general principles have been established respecting the way in which a court ought to assess whether a class proceeding is the preferable proceeding. These general principles include:

- The class action must represent a fair, efficient and manageable procedure that is preferable to any other alternative method of resolving the claim, such as joinder, test case or consolidation of actions. All alternate forms of proceedings put forth by the parties ought to be considered by the Court. See *Cloud v. Canada (Attorney General)*, *supra*, at paras. 73-75; *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 23 (Ont. S.C.J.); *Knight v. Imperial Tobacco*

Canada Ltd., 2006 BCCA 235, 267 D.L.R. (4th) 579 at para. 24; *Lavier v. MyTravel Canada Holidays Inc.* (2009), 248 O.A.C. 378 (Ont. Div. Ct.), rev'g (2008), 59 C.P.C. (6th) 57 (Ont. S.C.J.); *Williams v. Mutual Life Insurance Co. of Canada* (2000), 51 O.R. (3d) 54 at para. 50 (S.C.J.), aff'd (2001), 17 C.P.C. (5th) (Ont. Div. Ct.), aff'd (2003), 226 D.L.R. (4th) 112 (Ont. C.A.) and (2003), 226 D.L.R. (4th) 131 (Ont. C.A.); and *Brimner v. Via Rail Canada Inc.* (2000), 47 O.R. (3rd) 793 at para. 7 (Div. Ct.), rev'g (1999), 47 O.R. (3d) 798 (S.C.J.).

- The determination of the common issues in a class action should advance the proceeding in accordance with the policy objectives of the Act, namely:

  - access to justice;
  - judicial economy; and
  - modification of the behaviour of the wrongdoer.

  See *Schweyer v. Laidlaw Carriers Inc.* (2000), 44 C.P.C. (4th) 236 (Ont. S.C.J.); and *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 at paras. 119-121 (S.C.J.), leave to appeal refused, (2000), 52 O.R. (3d) 20 (S.C.J.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 88 (QL).

- The Court, in reaching its decision on preferable procedure, should consider all of the common and individual factors as part of a factual matrix. See *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 at para. 25 (Ont. C.J. (Gen. Div.)); *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.); and *Gregg v.*

Freightliner Ltd. (c.o.b. Western Star Trucks), 2003 BCSC 241, 35 C.C.P.B. 31 at para. 81. This would include a consideration of the nature of the proposed common issues, the individual issues which would remain after determination of the common issues, the factors listed in the Act, the complexity and management of the proposed action as a whole, the general rights of the plaintiffs and the defendants. See *Chadha v. Bayer Inc.* (2001), 54 O.R. (3rd) 520 at para. 16 (Div. Ct.), rev'g (1999), 45 O.R. (3d) 29 (S.C.J.), aff'd (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 106 (QL); and *Price v. Panasonic Canada Inc.* (2002), 22 C.P.C. (5th) 382 at para. 43 (Ont. S.C.J.).

- A class action is not a preferable procedure where, even after a determination of the common issues, the action would then break down into substantial individual trials because, in such a case, the advantages of a class proceeding would be lost. See *Western Canadian Shopping Centres Inc. v. Dutton*, *supra*, at para. 39; and *Heward v. Eli Lilly & Co.* (2007), 39 C.P.C. (6th) 153 at para. 104 (Ont. S.C.J.), leave to appeal to Divisional Court granted, (2007), 45 C.P.C. 309 (Ont. S.C.J.), appeal dismissed, (2008), 295 D.L.R. (4th) 175 (Ont. Div. Ct.).

- The more the individual issues will predominate, the less efficient the class action becomes. However, the preferability requirement will still be met even though, after the resolution of the common issues, substantial individual issues remain to be resolved. In that sense, the common issues need not predominate over individual issues. See *Cloud v. Canada (Attorney General)*, *supra*, at para. 73-75; *Rosedale Motors*

Inc. v. Petro-Canada Inc. (1998), 42 O.R. (3d) 776 (Gen. Div.), rev'd on other grounds, [2001] O.J. No. 5368 (Div. Ct.) (QL), and *Lavier v. MyTravel Canada Holidays Inc., supra.*

- The preferability analysis cannot take place in a vacuum. The plaintiffs must establish that a class action is preferable to the use of individual proceedings to resolve the outstanding claims. See *Hollick v. Toronto (City), supra*, at para. 30; and Michael G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992*, (Aurora, Ont.: Canada Law Book, 1993) at 27.

- While the issue of whether individual issues predominate over common issues is not to be taken into account in the common issues analysis, it is an important factor to be considered in the preferable proceeding assessment because, in order to assess class action preferability, regard must be had to the option of using individual proceedings. The preferability requirement will not be satisfied if the common issues are overwhelmed by the individual issues that remain, such that the resolution of the common issues will essentially just mark the beginning of the process leading to the final disposition of the class members claims. See *Heward v. Eli Lilly & Co.* (Ont. S.C.J.) at para. 104.

(b) Preferable Procedure

[134] The defendants contend that a class action is not the preferable procedure because:

> 153. ... it is clear that any class action will break down into individual trials as there are a host of individual inquiries that will be necessary for each individual class member to prove the fact of loss, the nature of

> the loss, that such loss was directly caused by the use of the Defendants' pain pump and not from some other cause. [Memorandum of Fact and Law of DJO defendants]

[135] To support the above proposition, the defendants rely upon reasoning like that found in *Gariepy v. Shell Oil Co.* (2002), 23 C.P.C. (5th) 360 (Ont. S.C.J.), aff'd [2004] O.J. No. 5308 (Div. Ct.) (QL). At paragraph 65, Nordheimer J. stated:

> 65 ... Even if the products are inherently defective in all situations, there is still the need to prove that any failure is directly related to the product as opposed to issues of manufacture, design or installation, that any failure is unrelated to poor maintenance or misuse or other error and a host of other considerations.... The matter is more complicated if the scientific issue allows of different answers depending on local water conditions, levels of chlorine, etc. In that eventuality, there are further matters that must be individually assessed. In either scenario, the final determination of causation in this case becomes very much an individual issue with respect to each and every plumbing system. The answers to the common issues, consequently, do not constitute an element that will be conclusive of liability for any given member of the class. Individual members of the class may experience failures with respect to their plumbing systems that are unrelated to any defect in the defendants' products. In other words, success by the representative plaintiffs on the scientific question does not equate to success for all members of the class....

[136] The defendants submit that the issues that would still require determination as individual issues would be as follows:

> 159. ...
>
> a) Whether at the time the particular class member used the Defendants' pain pump, the state of scientific and medical knowledge available to DJO was such that it owed a duty to warn of the risks of chondrolysis;
>
> b) Whether, for any given class member, DJO met that duty in light of the mix of information publicly available and accessible to the given class member;
>
> c) Whether the class member actually relied on any statements made by DJO;

d) Whether the class member would have used the Defendants' pain pump even if other information had been available;

e) Whether the alleged wrongful conduct of DJO *caused* the proposed class member to use the Defendants' pain pumps;

f) Whether the pain pump used *caused or contributed to* the injury or damage alleged;

g) Whether the class member's medical or treatment history included another suspected cause of chondrolysis, including, natural arthritic process (osteoarthritis), chronic synovitis, infection, protruding hardware, thermal radiofrequency energy, the use of anchors or bioabsorbable materials, leaking bone cement, the use of chlorhexidine as an irrigating solution during surgery, the use of gentian violet, fibronectin, operative technique, etc.;

h) Whether the chondrolysis was idiopathic, or unexplained chondrolysis;

i) What individual choices were made by the surgeon and/or patient respecting the use of the pain pump, including the size of the pain pump, whether one or two catheters were inserted into the surgical site, the entry site of the catheter(s), the location of insertion of the catheter(s), the type of medication(s) loaded into the pain pump, the flow rate of the medication(s), the duration of use, etc.;

j) Whether the class member actually suffered any damage as a result of using the Defendants' pain pump;

k) If damages were suffered, what is the quantum; and

l) Whether the surgeon, hospital and drug manufacturer should be added as defendants.

[Emphasis in original.]

[Memorandum of Fact and Law of DJO defendants]

[137] The defendants argue, quite simply, that the common issues would be subsumed by individual issues, and individual trials would be necessary for each class member. The defendants submit that the class action is not the preferable procedure and that the actions of the plaintiffs and any other parties with similar complaints would be

more suitably resolved in individual actions, with case management, that might include:

> 165. ...
>
> a) scheduling of common discoveries;
>
> b) selection of test cases to proceed first;
>
> c) orders for trial together;
>
> d) joinder of claims which are similar; or
>
> e) other techniques well known to our Courts to deal with mass torts.
>
> [Memorandum of Fact and Law of DJO defendants]

See *First Choice Capital Fund Ltd. v. First Canadian Capital Corp.*, [1999] 11 W.W.R. 249 at para. 37 (Sask. Q.B.).

[138] In order to properly assess the various arguments, pro and con, respecting preferable procedure, it is necessary, in my view, to step back and conduct a common sense analysis of how the resolution of the claim might unfold.

[139] If there was a common issue trial, focused on the common issues that have been previously identified, one possible outcome would be that the defendants would be successful and that all of the claims of the class members covered by the class action would be dismissed. Another potential outcome would be that the common issues would be resolved in favour of the plaintiffs, in which case, admittedly, some further process respecting the claims of the individual plaintiffs would be required.

[140] One of the primary focuses of a common issue trial would be whether injecting anaesthetic into the synovial cavity of a shoulder or knee, via the pain pump, after surgery causes chondrolysis. The resolution of this question would presumably involve significant evidence, and in particular expert evidence, respecting the crucial question of proximate cause. The defendants argue that the pain pump does not cause

chondrolysis but that there are a myriad of other factors, unrelated to the use of the pain pump, that cause chondrolysis. According to the defendants, "In short, a pain pump does not cause chondrolysis. What does cause chondrolysis is still not established." (Paragraph 5 of the Memorandum of Fact and Law of the DJO defendants.)

[141] Obviously, at this early stage, the Court is in no position to determine whether or not the defendants' pain pump does, or does not, cause chondrolysis. That is not an inquiry for this Court at this stage. However, the determination of that question at a common issues trial would, in my view, materially advance the claim in that a negative determination would effectively end the plaintiffs' claims, while a positive determination would materially advance the plaintiffs' claims.

[142] The trier of fact would be required to embark upon an analysis to determine whether or not the plaintiffs are able to establish that the pain pumps caused chondrolysis. Was the "cause" of the chondrolysis the defendants' pain pump? The doctor's decision? The type of anaesthetic used? The patient's predisposition to chondrolysis? These legal and factual questions are at the very heart of this case.

[143] The resolution of the causation issue might involve a similar analysis to that undertaken by Freedman C.J. in *Meyer v. Allstate Insurance Co. of Canada* (1980), 115 D.L.R. (3d) 90 (Man. C.A.). That case involved a plaintiff who sued the insurance company after her foot was amputated and the insurance company refused to pay out dismemberment benefits. The plaintiff, a diabetic, injured her foot when getting out of an automobile. Her foot became gangrenous and was amputated below the knee. The policy provided for payment of dismemberment benefits if an amputation was "caused by an accident resulting directly and independently of all other causes." The plaintiff contended that the "accident" caused the dismemberment, while the insurance company claimed that it was the diabetes that qualified as the cause of the amputation.

Freedman C.J. analysed the issue as follows:

> 3 I go back to my law-school days to rediscover the principle which may guide us here. An illustration from those days may usefully be recalled. Jones comes from Saskatoon to Winnipeg. He goes to a sporting-goods store and buys a gun and ammunition. He then seeks out his enemy, Robinson. When Robinson, hearing the ring of his doorbell, opens the door, Jones shoots and kills him.
>
> 4 What was the cause of Robinson's death? Some might say it was the fact that Jones came from Saskatoon to Winnipeg. The only thing that can support that theory is the recognition that if Jones had remained in Saskatoon Robinson would not have been killed. But for all of us it is surely an affront to logic and common sense to ascribe Robinson's death to Jones's journey from Saskatoon to Winnipeg. Fortunately the law provides us with a working formula that should lead us from the path of error to the correct solution. It says that the visit from Saskatoon to Winnipeg was not a proximate cause, not a *causa causans*, but only a *causa sine qua non*. That is to say, it was a circumstance or condition without which Robinson's death would not have occurred, but yet was not itself the cause of his death.
>
> 5 A similar answer would have to be given to the contention that the cause of Robinson's death was the purchase by Jones of the gun and ammunition. We come here a step closer to the real cause of the death but we are not yet there. The purchase in question, like the journey from Saskatoon, is again a *cause sine qua non* and not a *cause causans* – that is to say, it is not the proximate or effective cause of Robinson's death.
>
> 6 What then was the *causa causans* of Robinson's death? Surely it was the deliberate act of Jones in firing the gun at Robinson and killing him. All anterior matters, although playing a role in the scenario, were simply circumstances or conditions forming the background against which the proximate or effective cause of the death – namely, the shooting of Robinson by Jones – came into play.
>
> 7 Guided by the principle emerging from the above illustration, I return to Mrs. Meyer, her accident, and her amputation. The issue that confronts us here is to determine whether the amputation resulted from the accident directly and independently of all other causes. That determination in turn depends on the proper assessment of the role played by the diabetes and arteriosclerosis. Were they effective causes of the amputation or were they simply conditions or circumstances upon which the plaintiff's injury operated? The learned trial Judge, Morse, J., concluded that the amputation resulted from a combination of causes – the accident plus the two pre-existing diseases – and hence fell outside the terms of the policy. He accordingly dismissed the

> plaintiff's action.
>
> ...
>
> 12 It was the accident to her foot that was the effective cause of Mrs. Meyer's amputation. That the pre-existing diseases of diabetes and arteriosclerosis played their sinister role in bringing on gangrene leading to the amputation may well be the case. But that does not make these diseases the effective cause of the amputation. Rather they are conditions on which the plaintiff's injury operated. The language of Munkman in an article entitled "Note on the Causes of an Accidental Occurrence", (1954) 17 Mod. Law Review 134 at 137 is relevant here:
>
> > "A condition sine qua non resembles a cause to this extent, that the accident could not happen without it: but it is no more than the setting of the stage, and is not one of the factors which brings about the accident."
>
> In the context of the present case the term "accident" would be the equivalent of "amputation".
>
> ...
>
> 22 I would hold that the immediate, the proximate, the precipitating cause of Mrs. Meyer's injury – the *causa causans*, in short – was the accidental injury to her foot, which then operated on her diseased physical state represented by diabetes and arteriosclerosis, which in this context were conditions *sine qua non*.

The above decision is referred to simply to illustrate that causation is a major and substantial issue that requires significant evidence and thoughtful legal analysis. The resolution of the issue of whether the pain pump "caused" the chondrolysis or whether there is some other aspect which overtakes the pain pump to become the proximate cause will go a long way to resolving the various claims.

[144] Should the plaintiffs be successful in this first hurdle, the claim would be significantly advanced, although a positive finding on this point would not necessarily determine the action. The plaintiffs must still establish that the defendants owed them a duty of care and that the duty of care was breached.

[145] While the first of these two questions may not be that difficult to resolve, the second question, the breach of the duty of care, would also involve significant

evidence and, as with the causation issue, careful legal analysis. What the defendants knew or did not know and a variety of other factors would go into the mix to determine whether or not there was a breach of the duty of care (assuming that it was found that the defendants were owed a duty of care).

[146] The resolution of this issue, too, would materially and substantially advance the claim. Similarly, with the questions pertaining to punitive damages and/or exemplary damages and consumer product warranties, the answers to these questions would, in my view, significantly advance the yardsticks of the litigation.

[147] I have considered all of the other options available to the class members, including individual actions and test cases. However, given all of the circumstances, including but not limited to the complexity of the issues involved and the significant costs associated with prosecuting such a claim, I am convinced that the class action is not only preferable, but perhaps the only viable option. Furthermore, the resolution of the common issues would be pivotal to the resolution of the litigation and, in the circumstances here, the class action proceeding is a fair, efficient, manageable and logical way to advance the litigation.

[148] In arriving at this conclusion, I am mindful of the analysis of the Court of Appeal in *Sorotski v. CNH Global N.V.*, *supra*. The *Sorotski* case involved a proposed class action which alleged that the track on Case Quadtrac Model 9370 tractors were defectively designed, manufactured and distributed, which resulted in premature cracking of the tracks. The claim sought damages on the basis of statutory warranty and on the basis of contract and negligence. The trial judge declined to certify the action for a number of reasons, including that the class action was not the preferable procedure for resolving the claim. The certification judge's decision was overturned by the Court of Appeal, who concluded that certification was appropriate and that a class action was the

preferable procedure. Richards J.A., writing for a unanimous Court of Appeal, stated:

> 64 It is clear that the questions of whether Case breached the *Implements Act* warranties and whether it was negligent in the design and manufacture of the Quadtrac, or in failing to warn purchasers about the alleged defects in the tracks, are the most involved and the most significant aspects of the proposed proceedings. The favourable resolution of those questions will very substantially advance the positions of individual Quadtrac owners. While the circumstances in which particular tractors have been used might impact on liability or affect the damages payable to individual purchasers, it is apparent that the common issues are the key to this litigation. This is not a situation where the common issues are small or insignificant in relation to the individual issues. As a result, particularly in light of the fact that this litigation now has been narrowed to some extent, it is apparent that a class proceeding is a fair, efficient and manageable method of advancing the claim.
>
> ...
>
> 67 The central claim advanced by Quadtrac owners will be that the tracks were negligently designed and manufactured. Saskatchewan owners will have an additional, and not unrelated, argument that the tracks are so defective or unfit so as to engage the warranty provisions of the *Implements Act*. It is inevitable that their arguments on both of these fronts, and particularly on the negligence front, will have to be advanced by reliance on expert evidence. Indeed, one preliminary-type expert opinion has already been commissioned by Mr. Sorotski and the expert opinion of Gary Tompkin has been tendered on behalf of Case. It is obvious that, in this context, a claim of less than $50,000, and particularly a claim coming within the small claims jurisdiction limits, will be of dubious financial viability for an individual Quadtrac purchaser. It seems obvious that few actions of this size would proceed after a prospective litigant weighs the amount of his or her potential recovery against likely legal fees, the cost of retaining an expert or experts and the risk of an unfavourable award of costs if the claim does not succeed. By way of contrast, a class action proceeding would make smaller claims more viable by spreading the cost of experts and legal fees across a larger number of plaintiffs and, by virtue of s. 40 of *The Class Actions Act*, by removing from the equation the possibility of an unfavourable ruling on costs if the claim is unsuccessful.
>
> ...
>
> 70 Before concluding the consideration of s. 6(d) it is also useful to briefly consider the preferability question by way of direct reference to the three key objectives of class action litigation: judicial economy, access to justice and behaviour modification.

> 71 Turning first to the issue of judicial economy, as noted above, the common issues are the most significant and involved aspects of these proceedings. While damage awards and perhaps some points going to liability will need to be determined individually, meaningful economies will be generated by facilitating resolution of the common issues in a single trial.
>
> 72 Similarly, a class action will serve the interests of access to justice. As explained, the likely amount of the damages suffered by Quadtrac purchasers is small enough that the prospect of proceeding to trial on an individual basis will be a serious deterrent to most litigants.
>
> 73 A class proceeding should also promote behaviour modification. For his part, the certification judge concluded that behaviour modification is not a particularly pressing issue in the circumstances of this case because "both of the defendants, Case and Goodyear, appear to have put into place mechanisms for addressing various of the complaints described in the statement of claim." It is unclear how he arrived at this conclusion. The record reveals no mechanism for addressing complaints other than a generic warranty program. This program has offered no comfort to Mr. Sorotski and appears unlikely to offer comfort to any other class member given the position of Case and Goodyear that the cracking of the tracks is merely cosmetic. Terri Hullibarger's affidavit does refer to warranty "claims" for flex cracking but it says nothing about how or if those claims were resolved. The situation here is clearly different than, for example, the one in *Hollick* where a claims fund had been established to provide compensation to the individuals who would form the proposed class. In my view, the certification judge erred to the extent he declined to certify a class proceeding on the basis that such a proceeding was not necessary to promote behaviour modification.

[149] I conclude for all of the reasons cited above, that a class action is the preferable procedure for the resolution of the common issues.

5. (a) Is there a person willing to be appointed as a representative plaintiff who would fairly and adequately represent the interests of the class? (s. 6(1)(e)(i))

[150] One of the prerequisites for certification is that there must be a person willing to be appointed as a representative plaintiff who would fairly and adequately represent the interests of the class. In *Western Canadian Shopping Centres Inc. v. Dutton*,

supra, McLachlin C.J., writing for the Supreme Court of Canada, commented on this criterion at paragraph 41 as follows:

> 41 ... the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class....

[151] The concept of the representative plaintiff prosecuting the interests of the class was further explained by Tallis J.A. in *Monsanto Canada Inc. v. Hoffman*, 2002 SKCA 120, 220 D.L.R. (4th) 542, where, at paragraph 16, he stated:

> 16 ... When a plaintiff sues on behalf of a class he assumes a fiduciary obligation to members of the class, surrendering any right to compromise a group action for his individual gain or advantage. Even if a named plaintiff receives all of the benefits that he seeks in the claim, such success does not relieve him of the duty to continue the action for the benefit of others similarly situated. ...

[152] The "vigorously prosecute" term has been succinctly described in *Campbell v. Flexwatt* (1997), 44 B.C.L.R. (3d) 343 (C.A.), leave to appeal to the S.C.C. denied, [1998] S.C.C.A. No. 13 (QL), as follows:

> 75 ... the two most important considerations in determining whether a plaintiff was appropriate were whether there was a common interest with other class members and whether the representatives would "vigorously prosecute" the claim.
>
> 76 It has been established that there is a common interest and I can see no reason why the representative plaintiffs would not vigorously prosecute the claim. Any individual plaintiffs who feel that the representative plaintiffs would not represent them well may opt out of the class proceeding and pursue individual actions.

[153] The plaintiff proposed three representative plaintiffs; namely, Sean Schroeder, Allister Curtis Veinot, and/or Eleanore Smiroldo, as litigation guardian for her daughter Eden Bobyk. Each of the proposed representative plaintiffs reside in Saskatoon, and each had surgery performed on them by Dr. Mark Ernst. Mr. Schroeder and Mr. Veinot had shoulder surgery, while Ms. Bobyk had knee surgery.

[154] The proposed representative plaintiffs have filed affidavits indicating that they are ready, willing and able to vigorously prosecute the claim.

[155] The defendants submit that they are not appropriate representative plaintiffs because they have demonstrated that they will not fairly and adequately represent the interests of the class because they have stated that they are not prepared to sue the surgeon who conducted the surgery or the drug manufacturers that produced the anaesthetic which was injected into the synovial cavity. Essentially, therefore, the defendants complain that the representative plaintiffs are not appropriate because they choose to focus this action on the defendants as opposed to other potential parties who the defendants claim are responsible for the injuries.

[156] The arguments made by the defendants do not persuade me that the plaintiffs are not appropriate plaintiffs. Obviously, they are not experts on civil procedure but appear to have a reasonable layperson's understanding of the action. The defendants were permitted to cross-examine the proposed plaintiffs on their affidavits, and I have reviewed the transcripts of the cross-examinations and the affidavits that were filed in support of the certification application. After having done so, I am satisfied that they are interested and informed in the action, that they understand their duties and that they are the ones that ultimately instruct counsel. The fact that they have chosen not to sue their surgeon or the drug manufacturer does not, in my view, suggest that they are not taking

their obligation seriously. Quite the contrary. They have considered their options and, with the assistance of legal counsel, have chosen to focus on the defendants.

[157] Accordingly, I have little difficulty in concluding that all three proposed plaintiffs are prepared to be appointed as representative plaintiffs and that they will fairly and adequately represent the interests of the class.

(b) Is there a person willing to be appointed as a representative plaintiff who has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action? (s. 6(1)(e)(ii))

[158] The plaintiffs have filed a proposed litigation plan as part of their certification application. The litigation plan demonstrates that the plaintiffs, and their counsel, have thought out how the action may proceed and be resolved. The defendants have not seriously targeted the proposed litigation plan as a deficiency. Rather, the defendants have taken the position that should this action be certified, they would like the opportunity to make representations concerning the proposed litigation plan. This is a reasonable position. Hence, I find that the litigation plan, as submitted, is, for the most part, appropriate. The parties will have the opportunity, if necessary, subsequent to the rendering of this decision, to make further representations to me concerning the proposed litigation plan. I would request that the parties discuss their differences and attempt to arrive at a common litigation plan that will satisfy all parties. Should they be unable to agree upon the precise terms of the litigation plan, a hearing will be convened for the purpose of resolving any issues that arise respecting the content and implementation of the litigation plan.

[159] Accordingly, I conclude that the litigation plan filed is *prima facie* reasonable and is sufficient to satisfy the requirements of the certification. However, given that the defendants have requested the right to make submissions concerning the

details of the litigation plan should the action be certified, rather than certifying the action that includes the litigation plan as filed, I instead choose to give the parties the opportunity to edit the current litigation plan by mutual agreement and, failing the parties being able to achieve consensus, I will hear the parties on the outstanding issues and then rule on any points of contention.

(c) Is there a person willing to be appointed as a representative plaintiff who does not have, on the common issues, an interest that is in conflict with the interests of other class members? (s. 6(1)(e)(iii))

[160] The defendants have not alleged or established that any of the three proposed plaintiffs have interests that are in conflict with the interests of other potential class members. I find that this criterion has been met.

*6. Should the Court exercise its discretion and deny the certification application, notwithstanding that the conditions for certification have been satisfied? (*Western Canadian Shopping Centres Inc. v. Dutton, *[2001] 2 S.C.R. 534, 2001 SCC 46.)*

[161] Even where all criteria are met, the Supreme Court of Canada has indicated that the Court can, nonetheless, exercise its discretion and not allow certification if the benefits of certification are outweighed by the unfairness that certification may cause to the parties. Beginning at paragraph 44 of *Western Canadian Shopping Centres Inc. v. Dutton*, *supra*, McLachlin C.J., speaking for the Court, stated, in part:

> 44 Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.
>
> ...
>
> 48 ... If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing

> considerations that outweigh the benefits of allowing the class action to proceed.

[162] In my view, the criteria as set forth by the Act have been satisfied and there are no countervailing considerations that would justify the exercise of the Court's discretion to deny certification.

(C) Multi-jurisdictional class action considerations

[163] The plaintiffs seek to have this action certified as a multi-jurisdictional class action. As a result it is necessary to consider the impact, if any, of ss. 6(2) and (3) (similar class action/proposed class action commenced elsewhere) and ss. 6.1(1) and (2) (other considerations where action is multi-jurisdictional).

1. Similar class action elsewhere (ss. 6(2) and (3))

[164] Section 6(2) of the Act deals with the process that ought to be followed in circumstances where another class action has already been commenced elsewhere in Canada involving the same subject matter. In this case, counsel have agreed and formally admitted that there are no other similar class actions and therefore an analysis pursuant to s. 6(2) and (3) is not necessary.

2. Other multi-jurisdictional considerations (ss. 6.1(1) and (2))

[165] Section 6.1(1) of the Act reads as follows:

> **6.1**(1) The court may make any order it considers appropriate in an application to certify a multi-jurisdictional class action, including the following:
>
> (a) an order certifying the action as a multi-jurisdictional class action if:
>
> (i) the criteria set out in subsection 6(1) have been satisfied; and

(ii) having regard to subsections 6(2) and (3), the court determines that Saskatchewan is the appropriate venue for the multi-jurisdictional class action;

(b) an order refusing to certify the action if the court determines that it should proceed as a multi-jurisdictional class action in another jurisdiction;

(c) an order refusing to certify a portion of a proposed class if the members of that portion of the class contains members who may be included in a pending or proposed class action in another jurisdiction.

(2) If the court certifies a multi-jurisdictional class action, the court may:

(a) divide the class into resident and non-resident subclasses;

(b) appoint a separate representative plaintiff for each subclass; and

(c) specify the manner in which, and the time within which, members of each subclass may opt out of the action.

[166] It is clear that there ought to be two classes. The primary class would include all class members resident anywhere in Canada. The subclass would include those class members who are resident in Saskatchewan. The reason for the separation of the two classes, as discussed above, is because the Saskatchewan residents would have the additional potential benefit of the CPA.

3. Summary

[167] Accordingly, I conclude that, pursuant to s. 6.1(1)(a)(i), the criteria set out in s. 6(1) of the Act has been satisfied. There is no need to apply s. 6(2) or (3) of the Act because there is no other action or proposed action pending in connection with other similar claims. I see no need to appoint separate representative plaintiffs for each subclass or specify other times within which members of the subclass may opt out. However, it is necessary, in my view, to divide the class into a resident class and a non-resident subclass as indicated herein.

VII. Conclusion

[168] The proposed plaintiffs have applied to this Court for an order that the within action be certified as a class action. Section 6(1) of the Act requires that the Court certify an action as a class action on an application if the Court is satisfied that the criteria set forth in s. 6(1) have been met. For the reasons cited above, I conclude that all criteria for certification set forth in the Act have, in fact, been sufficiently met and, therefore, order that the within action be certified.

[169] Section 10 of the Act specifies what a certification order must include. With that provision in mind and for the reasons related above, the order that I make is as follows:

1. The within action shall be certified as class action.

2. The class covered by the within certification order includes all persons resident in Saskatchewan and elsewhere in Canada who used the defendants' pain pump sold under the brand name "DonJoy Pain Control Device" and who claim to have suffered injury as a result of such use (the "general class").

3. The subclass covered by the within certification order shall include all persons resident in Saskatchewan who used the defendants' pain pump sold under the name "DonJoy Pain Control Device" and who claim to have suffered injury as a result of such use (the "subclass").

4. Sean Schroeder, Allister Curtis Veinot and Eleanore Smiroldo, as litigation guardian for Eden Bobyk, are hereby appointed the representative plaintiffs for the class. The style of cause of the

statement of claim shall be amended to include Eleanore Smiroldo, as litigation guardian for Eden Bobyk, as one of the three plaintiffs. Also, the plaintiffs are hereby given leave to amend their statement of claim by adding "Eleanore Smiroldo, as Litigation Guardian for Eden Bobyk" as a party to the action and by adding amendments to the statement of claim that are consequentially necessary as a result of the addition of Ms. Smiroldo.

5. The nature of the claims asserted on behalf of the class are as follows:

   (a) the general class alleges negligence against the defendants and asserts that the defendants' pain pump caused them to develop a condition known as chondrolysis; and

   (b) the subclass alleges that there was a statutory breach of the duty of care as provided for in *The Consumer Protection Act*, in addition to the allegation of negligence asserted by the general class.

6. The relief claimed by the class is damages, which includes the following:

   (a) pain, suffering and loss of quality and enjoyment of life;

   (b) past and future loss of income;

   (c) loss of earning capacity and future loss of opportunity;

   (d) past and future cost of care;

(e) out-of-pocket expenses incurred by the plaintiffs and class members or for their benefit; and

(f) medical expenses, including the costs of diagnosis and treatment of their injuries.

7. In addition, the general class claims common law punitive damages and the subclass claims exemplary damages as provided for in *The Consumer Protection Act*.

8. The common issues to be determined at the common issues trial for the general class are as follows:

(i) Does the DonJoy Pain Control Device cause chondrolysis when placed in the synovial cavity of a knee or shoulder following surgery?

(ii) Whether the defendants, or any of them, owed a duty of care to class members?

(iii) Whether the defendants, or any of them, breached a duty of care to class members and, if so, when?

(iv) Whether class members are entitled to punitive damages at common law?

9. The common issues to be determined at the common issues trial for the subclass are as follows:

(i) Whether the defendants, or any of them, owed the subclass a statutory duty under *The Consumer Protection Act*?

(ii) Whether the defendants, or any of them, breached any of the statutory duties owed to the subclass under *The Consumer Protection Act*?

(iii) Whether subclass members are entitled to exemplary damages under *The Consumer Protection Act*?

10. The manner in which, and the time within which, a class member may opt out of the class action has not been fully canvassed by counsel. Similarly, the way in which notice that an action has been certified as a class action and the way in which such notification ought to be handled has also not been fully canvassed by counsel. As a result, the parties are directed to file with the Court, within 45 days from today's date, a mutually agreed upon draft order specifying the manner in which and the time within which class members may opt out of the class action and the content of a notice of certification and the time when and by what means such notice is to be given pursuant to s. 21 of *The Class Actions Act*. In the event, however, that counsel are not able to agree upon any of these matters, counsel shall submit, within 60 days from today's date, their respective proposals with respect to these outstanding matters.

11. Similarly, the parties are directed to file with the Court, within 45 days from today's date, a mutually agreed upon litigation plan. In the event, however, that counsel are not able to agree upon the content of the litigation plan, counsel shall submit, within 60 days from today's date, their respective proposals for a litigation plan.

12. Thereafter, a hearing date will be selected, after consultation with counsel, at which time the parties may make full representation with respect to any outstanding issues pertaining to the matters referred to above in subparagraphs 10 and 11, after which the Court will render a formal decision with respect to the issues in contention.

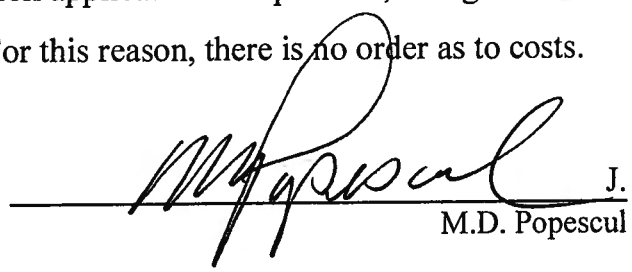
[170] I note, in passing, that it may be necessary at some point in the future to amend the certification order to create other subclasses made up of residents from other provinces who may be entitled to the benefit of remedies contained in consumer protection statutes passed by the Legislatures of their respective provinces. Would British Columbian class members, for example, be entitled to be placed in a British Columbian subclass in order to determine their entitlement to remedies contained in their province's consumer protection legislation? However, because this issue was not raised by counsel during any of the proceedings held before me, it is not necessary to address that question at this time.

VIII. Costs

[171] Section 40 of the Act stipulates that the Court ought not award costs to any party respecting an application for certification unless the Court considers that:

> **40** ...
>
> (2) ...
>
> (a) there has been vexatious, frivolous or abusive conduct on the part of any party
>
> (b) an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing the costs or for any other improper purpose; or
>
> (c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.

[172] In this case, the plaintiffs have been successful. There is nothing in the action, or the way in which the certification application was pursued, that gives rise to any of the factors discussed in s. 40(2). For this reason, there is no order as to costs.



J.
M.D. Popescul

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