IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Chalmers v. AMO Canada Company,*** 2009 BCSC 689

Date: 20090526
Docket: S074512
Registry: Vancouver

Between:

Trina Lorraine Chalmers, an infant, by her Litigation Guardian, Cherie Chalmers

Plaintiff

And

AMO Canada Company and Advanced Medical Optics, Inc.

Defendants

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

Counsel for the Plaintiff	David A. Klein Douglas Lennox Nicola Hartigan
Counsel for the Defendants	Malcolm N. Ruby Joanne Kuroyama Michael J. Schalke
Date and Place of Hearing:	December 1-3, 2008 and March 3, 2009 Vancouver, B.C.

[1] Trina Chalmers, the infant plaintiff, alleges that she contracted *Acanthamoeba* keratitis ("AK"), a rare but serious eye infection, from her use of All-in-One MoisturePlus contact lens solution (the "Solution"), a product that the defendants, AMO Canada Company and Advanced Medical Optics, Inc. (collectively referred to as "AMO"), voluntarily recalled in May 2007. Ms. Chalmers claims that AMO was negligent in researching, developing, testing, manufacturing, distributing, and selling the Solution. She further claims that AMO engaged in deceptive acts or practices contrary to the ***Business Practices and Consumer Protection Act***, S.B.C. 2004, c. 2 (the "***BPCPA***").

[2] On this application, Ms. Chalmers seeks an order certifying this proceeding as a class proceeding pursuant to the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50 (the "***Act***") and appointing her as representative plaintiff. She proposes the following class definition:

> All persons resident in Canada who purchased or used the … Solution and who (a) contracted [AK] after using the … Solution, or (b) underwent testing for [AK] after using the … Solution, or (c) had a monetary loss with respect to contact lenses or contact lens solution that had to be discarded as a result of the recall of the … Solution.

[3] As of the date of this hearing, there were 15 known actions commenced against AMO in Canada, including this one. Two of those are individual actions; the remainder are proposed class proceedings. This is the first of the proposed class proceedings to proceed to a certification hearing.

[4] Ms. Chalmers has proposed the following common issues:

(a) Was the Solution defective and/or unfit for its intended use?

(b) Did either or both of the defendants breach a duty of care owed to class members and, if so, how?

(c) Should either or both of the defendants pay punitive damages and, if so, to whom should those punitive damages be paid and in what amount?

(d) Did either or both of the defendants' solicitations, offers, advertisements, promotions, sales, and supply of the Solution for a personal or household use by class members fall within the meaning of "consumer transactions" under the ***BPCPA***?

(e) With respect to the sales in British Columbia of the defendants' Solution to class members for their personal or household use, are either or both of the defendants "suppliers" as defined by the ***BPCPA***?

(f) Are the class members "consumers" as defined by the ***BPCPA***?

(g) Did either or both of the defendants engage in conduct that was deceptive acts or practices contrary to the ***BPCPA*** as alleged in the statement of claim?

(h) If the court finds that either or both of the defendants' conduct was contrary to the ***BPCPA***, should a monetary award be made in favour of the class and, if so, in what amount?

[5] I will refer to common issues (a) and (b) as “the negligence common issues”, common issue (c) as “the punitive damages common issue”, and common issues (d) through (h) as “the ***BPCPA*** common issues”.

[6] The relevant statutory provisions for certification of class proceedings in British Columbia are set out in ss. 4(1), 4(2), and 7 of the ***Act***:

> 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> 4(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.
>
> ....
>
> 7. The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not known;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[7] Before the Court can certify an action as a class proceeding, the five requirements enumerated in s. 4(1) must be met. If they are met, the Court must certify the action. In this case, AMO opposes certification based on a number of the grounds set out in ss. 4(1)(a) through (e). It argues that:

> (a) Ms. Chalmers' statement of claim fails to disclose a cause of action under the ***BPCPA*** or to support a claim for punitive damages;

(b) the evidence before the Court is insufficient to establish that there are two or more persons who fall within any of the three subclasses proposed in Ms. Chalmers' class definition;

(c) the class definition is overly broad because it purports to include out of province residents;

(d) a class proceeding is not the preferable procedure for fair and efficient resolution of the issues; and

(e) Ms. Chalmers' litigation plan is unworkable.

[8] I have concluded that this action is suitable for certification as a class proceeding and that Ms. Chalmers is an appropriate representative plaintiff for the reasons that follow.

BACKGROUND

[9] After Ms. Chalmers began wearing contact lenses, she experienced pain, light sensitivity, and interference with vision in her left eye. She was diagnosed with AK, which is caused by *Acanthamoeba*, microscopic parasitic organisms. The infection results in inflammation and scarring of the cornea. It can cause severe pain and blindness, particularly if there is some delay in diagnosis. Diagnosis can sometimes be made with corneal scrapings, as was done in Ms. Chalmers' case. Alternatively, a more invasive biopsy may be required. It is also possible to make a presumptive diagnosis based on reported symptoms and the failure of the condition to respond to anti-viral or anti-bacterial agents. Once AK is diagnosed, rapid treatment is required to preserve

vision. Treatment can be prolonged; if it is not successful, corneal replacement may be required.

[10] There are a number of known risk factors for AK. The most common is the use of soft contact lenses. Historically, AK was very rare, but the incidence of the condition has increased with the popularity of soft contact lenses. Other risk factors include exposure to contaminated water, swimming with contact lenses, improper care of contact lenses, and overnight wear of contact lenses.

[11] In May 2007, the United States Center for Disease Control and Prevention informed AMO that 46 patients in the United States had developed AK and that of the 39 who were soft contact lens wearers, 21 reported using the Solution. After receiving this information, AMO voluntarily recalled the Solution on May 25, 2007 in the United States and on May 28, 2007 in Canada.

[12] On this hearing, the parties each filed expert reports. The two experts reviewed studies that examined an observed increase in the incidence of AK in recent years. The experts considered what association, if any, existed between use of the Solution and the reported cases of AK. That question required examination of the methodologies used in the available studies. It also involved an analysis of the statistical association between the use of the Solution and the onset of the condition.

[13] AMO's expert, Dr. Ward, accepted that two of the studies establish a statistically significant association between use of the Solution and AK. However, he suggested that the two studies fail to consider potential unknown risk factors.

[14] Ms. Chalmers' expert, Dr. Borden, concluded that there is a causal relationship between the development of AK and use of the Solution. In addition to the two studies that establish a statistical association, he referred to a Canadian study that was unavailable to Dr. Ward. This was a limited study performed at Toronto Western Hospital. It identified 16 patients with AK for whom the brand of contact lens cleaning solution was known. Of those, 12 of them, or 75%, used the Solution. By contrast, AMO's share of the contact lens cleaning solution market in Canada was only 15 to 21%.

[15] Both experts referred to a study performed by Dr. Kilvington, a leading AK expert. The study was published in 2008 after the Solution had been recalled from the market. Dr. Kilvington's study provides a possible explanation as to why use of the Solution may result in an increased risk of developing AK. Specifically, the Solution was reformulated in 2003 to combine propylene glycol with a phosphate buffering system; this had not been done before. Dr. Borden argued that AMO should have, and could have, done a similar study to Dr. Kilvington's before it released the Solution for public use as a matter of safety and efficacy.

[16] Dr. Ward took strong exception to Dr. Borden's suggestion that this study could have been performed before the product was marketed. He described that suggestion as "astonishing" and "neither scientific nor practical". He said that AMO had no reason to anticipate any negative effects from combining propylene glycol and the phosphate buffering system. Both of those compounds were permitted for use in contact lens solutions prior to the development of the Solution. Dr. Ward said that there was nothing in the published literature linking AK to the use of any commercially available contact

lens solution prior to the Solution being withdrawn from the market. AMO further noted that, prior to the product recall, there was no regulatory standard requiring contact lens solutions to be effective in killing *Acanthamoeba*.

[17] Of course, I do not need to resolve conflicting expert opinions at this stage of the litigation. A certification hearing is not a determination on the merits of the proceeding. The reports provide the necessary background for an understanding of AK and the issues that are relevant to cause, diagnosis, and treatment of the condition. Many of these issues are not contentious.

[18] There was also a difference of opinion between the experts as to the number of cases of AK reported in Canada. Dr. Ward indicated that he knew of only seven reported cases in Canada in the past 18 years. However, he was unaware of the Toronto Western study that reported 41 cases at just one hospital in a period of seven years.

[19] The difficulty in determining the number of AK cases arises in part because AK has not always been a reportable disease. As of the date of the hearing of this application, neither party was aware that on May 31, 2007, the B.C. Centre for Disease Control began to require reporting of AK in this province.

[20] On March 3, 2009, Ms. Chalmers brought an application to admit new evidence that included a letter from Dr. Patrick, Director of Epidemiology Services at the B.C. Centre for Disease Control. I allowed that application. Dr. Patrick's letter indicates that there were 32 lab confirmed cases of AK in British Columbia between January 2005 and

May 2008. Of the 18 patients who were interviewed by the B.C. Centre for Disease Control, 10 or 11 reported using the Solution.

[21] Ms. Chalmers' proposed class definition, however, is not restricted to residents of this province. It includes individuals who acquired and used the Solution outside of British Columbia, and who were diagnosed with the condition in other provinces. Affidavits of four individuals who want to opt in to proceedings in British Columbia were filed on this application. Of course, the tort issues to be considered in the British Columbia case will be similar to the tort issues that would be litigated in the province where the proposed litigants live, should an action be brought or a class action certified in those provinces.

DISCUSSION

Issue 1. Does Ms. Chalmers' statement of claim disclose causes of action?

[22] AMO does not dispute that Ms. Chalmers' statement of claim discloses a cause of action in negligence. However, it says that the averments in the statement of claim are not sufficient to support either an action under the ***BPCPA*** or a claim for punitive damages.

[23] The test to determine if a statement of claim discloses a cause of action under s. 4(1)(a) of the ***Act*** is akin to the test to determine if a claim should be struck under Rule 19(24)(a) of the ***Rules of Court***, B.C. Reg. 221/90 (the "***Rules***"). That test is set out in ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273. In ***Knight v. Imperial Tobacco Canada Ltd.***, 2005 BCSC 172, 43 B.C.L.R. (4th) 169, Satanove J. nicely summarized the test at para. 5:

> Unless it is "plain and obvious" that the statement of claim discloses no reasonable cause of action, this test should be considered satisfied. Neither the length and complexity of the issues, nor the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his case. Unless there is some radical defect amounting to an abuse of the court's process such that the claim should be struck, the action should proceed to trial[.]

Claims under the *BPCPA*

[24] The relevant portions of Ms. Chalmers' statement of claim with respect to her claims under the ***BPCPA*** are paragraphs 22 and 23, which state:

> 22. The Defendants' conduct in their solicitations, offers, advertisements, promotions, sales and supply of the Contact Lens Solution, as particularized above, had the capability, tendency or effect of deceiving or misleading consumers regarding the safety and efficacy of the Contact Lens Solution. The Defendants' conduct in its solicitations, offers, advertisements, promotions, sales and supply of the Contact Lens Solution were deceptive acts and practices contrary to s. 4 of the BPCPA. The Defendants' deceptive acts and practices included the Defendants' failure to properly disclose all material facts regarding the safety and efficacy of the Contact Lens Solution.
>
> 23. As a result of the Defendants' deceptive acts and practices, the Plaintiff and class members have suffered loss and damages. The Plaintiff seeks damages and statutory compensation pursuant to ss. 171 and 172 of the BPCPA on her own behalf and on behalf of class members who purchased and/or used the Contact Lens Solution for their personal use, including disgorgement of any revenue or profits obtained by the Defendants from the sale of the Contact Lens Solution.

[25] AMO advances two main arguments based on these allegations.

[26] First, it says that although Ms. Chalmers asserts in paragraph 22 that AMO's "solicitations, offers, advertisements, promotions, sales and supply" of the Solution "were deceptive acts and practices", the statement of claim does not disclose material facts or particulars of the acts that were allegedly deceptive, nor does it describe the way in which such acts were deceptive. According to AMO, the only particularization

provided is the same particularization used to support Ms. Chalmers' claim in negligence. AMO argues that the concept of "deceptive" acts connotes knowing, deliberate or fraudulent conduct to the extent that it is alleged that AMO concealed important facts about the Solution. In the absence of pleadings setting out material facts or particulars to support those allegations, AMO says that Ms. Chalmers' claim under the ***BPCPA*** is vague and does not have the specificity required for the claim to stand.

[27] Second, AMO says that in paragraph 23, Ms. Chalmers refers to s. 172 of the ***BPCPA*** and seeks "statutory compensation… including disgorgement of any revenue or profits obtained by the Defendants from the sale" of the Solution, but she fails to advance any claim for a declaration under s. 172(1)(a) or an injunction under s. 172(1)(b). Pursuant to s. 172 (3), before a court can make an order for monetary relief, it must have granted injunctive or declaratory relief. As a result, AMO asserts that this pleading fails to disclose a cause of action for the relief sought.

[28] At the hearing of the application, Ms. Chalmers indicated that if the action is certified, she will amend her prayer for relief and the second sentence of paragraph 23 to state that she "seeks injunctive and declaratory relief and damages and statutory compensation pursuant to ss. 171 and 172 of the ***BCPCA***". For the purpose of these reasons, I assume that she will make those amendments to her statement of claim. Consequently, I do not need to consider AMO's second argument.

[29] Turning to AMO's first argument, there is no question that the allegations in the statement of claim are broadly stated. Ms. Chalmers alleges at paragraph 15 that AMO

failed to warn consumers of the increased risk of AK infection caused by the Solution and that it marketed a product that was not safe, merchantable or fit for its intended use. The deception is alleged at paragraph 22, where Ms. Chalmers asserts that AMO's conduct had the capability, tendency or effect of deceiving or misleading consumers regarding the safety and efficacy of the Solution.

[30] While these are bare bones allegations, they do alert AMO to Ms. Chalmers' material allegation – that AMO marketed the Solution to the public in a way that represented it as a safe product for use when it was not because it caused an increased risk of AK. The material fact that Ms. Chalmers asserts as creating the deception is the marketing of the Solution in a way that indicated or implied to consumers that it was a safe product, without warning them of the risks it posed.

[31] Ms. Chalmers has not alleged what AMO's state of knowledge was when it was marketing the product. At this stage of the proceedings, she does not need to do so. In asking for material facts, AMO seems to want to know why she alleges that it should have known of the heightened risk of AK. AMO asserts in much of the material filed on this application that it has a defence to the action because it did not have any knowledge of the problems with the Solution. However, that assertion goes to the merits of the action, which cannot be considered at this stage of the case. In this action, as in many product liability actions, the plaintiff may be unable to flesh out the material allegations prior to discovery. That does not mean that the cause of action has not been detailed sufficiently to permit the action to proceed.

[32] With regard to the absence of particulars, AMO relies on Rule 19(11) which provides as follows:

> Where the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or where particulars may be necessary, full particulars, with dates and items if applicable, shall be stated in the pleading. …

[33] Here, AMO says that the claim of a deceptive act is the same as a claim for misrepresentation such that particulars of the misrepresentation should be provided. In ***R. (L.) v. British Columbia*** (1998), 65 B.C.L.R. (3d) 382 (S.C.), Kirkpatrick J. (as she then was) found that claims of misrepresentation were insufficiently particularized to permit an adequate assessment as to the utility of resolving that claim in a class action. She described the importance of particulars in class actions at para. 23:

> It is important to recognize that, in an application to certify a class action, the question of particulars is significant because the court is required to assess the suitability of the action as a class action. That exercise requires information traditionally supplied through particulars - the nature of the case and issues to be tried - as well as whether, in the words of s. 4(2)(a) of the *Act*, "questions of fact or law common to the members of the class predominate over any questions affecting only individual members." That assessment cannot be made in an information vacuum.

[34] The nature of the misrepresentation claim in ***R. (L.)*** was very different from the ***BPCPA*** claim advanced here. In ***R. (L.)***, the court found that the alleged misrepresentations were vague and devoid of the required specificity. However, in that case, the court also found that the issue of misrepresentation was an individual issue. In those circumstances, it is not surprising that the allegations were found to be vague.

[35] Here, there is no question that the misrepresentation or deceptive act that is alleged is the same for all purchasers of the Solution. There is sufficient particularization in the pleadings to allow the Court to "assess the suitability of the action as a class action" and to inform the defendants of the nature of the ***BPCPA*** claim.

[36] I conclude that it is not plain and obvious that the statement of claim discloses no reasonable cause of action under the ***BPCPA***. The pleading has no radical defect amounting to an abuse of the court's process. Ms. Chalmers' allegations of a claim under the ***BPCPA*** are sufficiently particularized and contain sufficient material facts to disclose a cause of action.

Punitive Damage Claim

[37] AMO also argues that Ms. Chalmers has pled insufficient material facts or particulars to support a claim for punitive damages. Here, the only basis for the punitive damages claim is Ms. Chalmers' assertion in paragraph 26 of the statement of claim that AMO's conduct was "reprehensible and departed to a marked degree from ordinary standards of decent behaviour". AMO argues that it is not sufficient to make conclusory allegations on a matter as significant as punitive damages. The plaintiff must provide some substance to alert the defendant of the case that it has to meet.

[38] In support of this proposition, AMO relies on ***Whiten v. Pilot Insurance Co.***, 2002 SCC 18, [2002] 1 S.C.R. 595. At para. 87, Binnie J. wrote:

> One of the purposes of a statement of claim is to alert the defendant to the case it has to meet, and if at the end of the day the defendant is surprised by an award against it that is a multiple of what it thought was the amount in issue, there is an obvious unfairness. Moreover, the facts said to justify punitive damages should be pleaded with some particularity. The time-

> honoured adjectives describing conduct as "harsh, vindictive, reprehensible and malicious" (*per* McIntyre J. in *Vorvis*, *supra*, p. 1108) or their pejorative equivalent, however apt to capture the essence of the remedy, are conclusory rather than explanatory.

[39] While Binnie J. was critical in ***Whiten*** of conclusory allegations without explanation, the allegations in ***Whiten*** were just that – conclusory without supporting particulars. Mr. Justice Binnie noted that the defendant did not ask for particulars of the claim for punitive damages, but said that if it had done so, it would have been entitled to them. After setting out some of the rather general allegations in the pleadings, he concluded as follows at para. 91:

> The statement of claim was somewhat deficient in failing to relate the plea for punitive damages to the precise facts said to give rise to the outrage, but Pilot was content to go to trial on this pleading and I do not think it should be heard to complain about it at this late date.

[40] At this stage of these proceedings, AMO has not demanded particulars, nor has Ms. Chalmers had an opportunity to conduct discovery or provide particulars. At some stage, she will likely need to provide particulars. However, on this application, the question is simply whether it is plain and obvious that the statement of claim discloses no reasonable cause of action. There is no question it does disclose a cause of action. The status of the pleadings is similar to the pleadings in ***Whiten***, where the Court found that the pleadings did support the claim for punitive damages.

[41] In arriving at this conclusion, I have taken into account the fact that the Court's consideration of the punitive damages claim will be similar to its consideration of the ***BPCPA*** claim. It will involve an assessment of the state of knowledge of AMO at the time it marketed the Solution. This is an issue that is amenable to resolution as a

common issue. The comments of McLachlin C.J. in ***Rumley v. British Columbia***, 2001 SCC 69, at para. 34, [2001] 3 S.C.R. 184, are relevant to the circumstances of this case.

[42] Accordingly, I find that the statement of claim discloses a cause of action for the punitive damages common issue.

Issue 2. Is there an identifiable class of two or more persons?

[43] Ms. Chalmers' proposed class definition includes three subclasses. AMO argues that there is insufficient admissible evidence to establish the existence of an identifiable class of two or more persons for any of the three subclasses. In making the argument, it relies upon ***Hollick v. Toronto (City)***, 2001 SCC 68, [2001] 3 S.C.R. 158, for the proposition that the plaintiff in a class action must "show some basis in fact" to meet the certification criteria. AMO also argues that on a certification hearing, information presented by the parties must meet the usual criteria for admissibility of evidence: ***Ernewein v. General Motors of Canada Ltd.***, 2005 BCCA 540, 46 B.C.L.R. (4th) 234.

[44] On this hearing, Ms. Chalmers only put evidence before the Court in relation to Subclass A (persons who contracted AK after using the Solution). For that reason, I will focus my analysis on whether there is sufficient evidence before the Court to certify that subclass. Currently, there is no basis for this Court to certify either Subclass B (persons who underwent testing for AK after using the Solution) or Subclass C (persons who had a monetary loss as a result of the recall of the Solution). However, this does not preclude the possibility of these subclasses being certified at a future date if sufficient evidence is brought before the Court on a further application.

Subclass A – Persons who contracted AK after using the Solution

[45] Ms. Chalmers relies on the information contained in several affidavits to support certification of Subclass A.

[46] Cherie Chalmers, Ms. Chalmers' mother and litigation guardian, swore that Ms. Chalmers used the Solution for at least two years and was diagnosed with AK after Dr. Dubord, one of her ophthalmologists, took corneal scrapings.

[47] Michelle Hutton also deposed that she was diagnosed with AK after Dr. Dubord took corneal scrapings from her. Her affidavit was filed shortly before the certification hearing. She expressed a wish to participate in the proposed class action.

[48] Bojan Petrovic, a legal assistant, swore that he was informed by one of the lawyers at Klein Lyons that the firm had been contacted by six individuals in British Columbia who claimed to have used the Solution and been diagnosed with AK, including Ms. Chalmers and Ms. Hutton.

[49] Alicyn Cummings, a paralegal with Klein Lyons, attached the letter from Dr. Patrick mentioned earlier in these reasons to her affidavit. I granted leave for Ms. Chalmers to file Ms. Cummings' affidavit even though the certification hearing concluded a few months before she made that application. I indicated at that hearing that I would provide my reasons for allowing the application to admit the additional evidence in these certification reasons. These are my reasons for that order.

[50] In allowing the application, I rejected AMO's argument that Ms. Chalmers had to meet the test for the introduction of fresh evidence set out in ***Zhu v. Li***, 2007 BCSC

1467, 43 R.F.L. (6th) 376. That decision considered an application to introduce fresh evidence after trial. There is a significant difference between how the discretion to admit fresh evidence is exercised following a trial, compared with an interlocutory matter: ***MacMillan Bloedel Limited. v. Mullin*** (1985), 66 B.C.L.R. 258 (C.A.). The test for admission of fresh evidence on an interlocutory matter will be more relaxed.

[51] In exercising my discretion to allow the new evidence, I took into account s. 5 of the ***Act***. It requires parties to file affidavits containing information relevant to certification. Pursuant to s. 5(5)(c), an affiant is required to "provide the person's best information on the number of members in the proposed class." That issue is relevant to both class size and notice.

[52] Here, AMO's position was that the potential class size was very small. Dr. Ward indicated that AK was not a reportable disease in Canada. The information contained in Dr. Patrick's letter shows that Dr. Ward was incorrect about the issue of reporting requirements in British Columbia, and implies that AMO's position on class size may be incorrect. The information contained in the affidavit was, thus, relevant and of some significance.

[53] The information contained in Dr. Patrick's letter should have been provided to the Court by one or both of the parties. Their failure to place that information before the Court at the time of the certification hearing should not leave the Court in the position of having to make the certification decision with incomplete information. It is a procedural decision. It should be made with the best information regarding potential class size before the Court. The ***Act*** contemplates that it may be necessary at times to adjourn

the certification hearing to permit amendment of materials or pleadings and to permit the parties to adduce further evidence: s. 5(6). This provision is included in the ***Act*** to allow the Court to have the best information available to inform its certification decision. My decision to admit the fresh evidence was intended to permit more complete information to be before the Court on this issue.

[54] The concerns that arise with the admission of fresh evidence following a trial are clearly different from those that arise on a certification application. While the parties should attempt to put all available information before the Court at the time of the certification hearing, the Court should be willing to consider additional evidence following the hearing where that evidence is relevant and an explanation is offered for the delay in placing it before the Court. The significance of the evidence and the merit in the explanation will be factors in the exercise of discretion. However, it is not necessary on a certification hearing that the party adducing additional evidence establish that a miscarriage of justice would probably occur or that the evidence would probably affect the result. Nor is it necessary for the party to establish that the evidence was not available with due diligence at the time of hearing of the application.

[55] Here, the additional evidence is reasonably credible. It is provided by the B.C. Centre for Disease Control, the organization charged with obtaining information regarding disease in this province. The evidence is relevant to the issues noted and provides a better picture of the extent of AK in the province during the period in question. Ms. Cummings' affidavit provides an explanation as to how counsel became aware of the information. It is not surprising the parties were unaware that the B.C. Centre for Disease Control required reporting of AK, as the experts were apparently

unaware of this at the time their reports were prepared. Given these circumstances, I exercised my discretion to admit the evidence.

[56] Following my ruling admitting Ms. Cummings' affidavit, AMO filed an affidavit that attached a further letter from Dr. Patrick dated March 30, 2009. That letter provided additional information about the reports of AK in British Columbia. Dr. Patrick stated that the cases were considered to be "lab confirmed" if there was "a compatible clinical presentation diagnosed by an Ophthalmologist with Laboratory Confirmation of Etiology" either through corneal tissue or scraping or identification of *Acanthamoeba* in the contact lens, Solution or lens case.

[57] Dr. Patrick was asked if the B.C. Centre for Disease Control had any data regarding the cause of AK in any of the cases. In response, Dr. Patrick indicated that causal inference was difficult with the data at hand, but that the Centre observed "a rapid drop off in case count (the epidemic curve) following AMO's voluntary recall of [the Solution]".

[58] In summary, Dr. Patrick's evidence was that there were 32 lab confirmed cases in British Columbia between January 2005 and May 2008. At least 55% of the 18 individuals interviewed reported use of the Solution.

[59] In addition to the affidavit evidence pertaining to British Columbia cases, Ms. Chalmers also relies on four affidavits of prospective non-resident claimants. All of these non-residents swore that they had been diagnosed with AK following use of the Solution. However, they provided no particulars as to who made each diagnosis, or how each diagnosis was made or confirmed.

[60] AMO concedes that there is some evidence to establish that there are two persons in the proposed class. However, it says that AK must be established based on reliable medical evidence; it asserts that there is none before the Court. It argues that the evidence provided by Ms. Cherie Chalmers and Ms. Hutton is hearsay. It further argues that the other evidence is inadmissible because Mr. Petrovic's evidence is triple hearsay, the evidence of Dr. Patrick is hearsay obtained by the B.C. Centre for Disease Control, and the evidence of the non-resident claimants is hearsay and does not identify the source of each diagnosis.

[61] In my view, the evidence of Ms. Cherie Chalmers and Ms. Hutton is sufficient to establish that there are two members of the proposed class in British Columbia. There is no need on a certification application for parties who suffer from disease to file affidavits from medical professionals confirming and setting out particulars as to the method of diagnosis. It is sufficient for the affected individual to swear that the diagnosis has been made. While that evidence is hearsay, where the source of the hearsay has been identified, the evidence can be admitted on an interlocutory application: Rule 51(10)(a) of the ***Rules***.

[62] The other evidence Ms. Chalmers relies on to provide some indication of class size is also admissible. The parties are required under s. 5(5)(c) of the ***Act*** to provide the "best information" regarding the number of members in the class. Such evidence will almost always be in the form of hearsay. While the evidence does not prove class size, it is relevant to considering the procedural issues that this Court must consider on a certification application.

[63] In summary, Ms. Chalmers has shown that there are two members of the class in British Columbia who contracted AK after using the solution. She has also provided information that there are likely other members in British Columbia, perhaps as many as 15 or 20. Further, the evidence establishes that there are likely numerous non-resident class members who contracted AK after using the Solution.

Issue 3. Can the class definition include residents of Canada outside of British Columbia who purchased the Solution?

[64] AMO argues that the class proposed by Ms. Chalmers is overly broad because she includes putative class members who do not reside in British Columbia. AMO says that the non-residents do not have a real and substantial connection to British Columbia because they purchased and used the Solution outside of this province. According to AMO, any damages that these non-residents suffered occurred in their home provinces and have no relationship to British Columbia.

[65] AMO further argues that the ***Court Jurisdiction and Proceedings Transfer Act***, S.B.C. 2003, c. 28 (the "***CJPTA***") has now replaced the common law and has codified the test for determination of jurisdiction and consideration of the issue of *forum non conveniens*. It argues that, pursuant to the ***CJPTA***, this Court has no jurisdiction to hear the non-residents' claims. Alternatively, it says that this Court should decline to exercise territorial competence because British Columbia is not a convenient forum in which to hear the proceeding because the evidence relating to damages and contributory negligence must come from witnesses who reside elsewhere.

[66] The Supreme Court of Canada recently concluded that the ***CJPTA*** provides a complete code for consideration of the territorial competence of this Court as well as

whether the court of another state is a more appropriate forum in which to hear a proceeding: ***Teck Cominco Metals Ltd. v. Lloyd's Underwriters***, 2009 SCC 11, [2009] 3 W.W.R. 191.

[67] The first step in the analysis is to determine if this Court has territorial competence to hear the claims of non-residents. Section 2(2) of the ***CJPTA*** specifies that "territorial competence is to be determined solely" by Part II of that Act. The starting point is s. 3 of the ***CJPTA***, which states in relevant part as follows:

> 3. A court has territorial competence in a proceeding that is brought against a person only if
>
> …
>
> (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
>
> (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

[68] AMO's argument focused entirely on sub-section 3(e), whether there is a real and substantial connection to British Columbia given the circumstances of this proceeding. While it is necessary to consider that issue in relation to the claims advanced against Advanced Medical Optics, Inc., there is no question that this Court has territorial competence in relation to the claims against AMO Canada Company under s. 3(d). That defendant is a Nova Scotia corporation that has been extra-provincially registered in British Columbia since 2003. As a result, pursuant to s. 7 of the ***CJPTA***, AMO Canada Company is ordinarily resident in British Columbia.

[69] With regard to the claims advanced against Advanced Medical Optics, Inc., the non-resident claimants must rely on s. 3(e). They must demonstrate that there is a real and substantial connection between this province and the facts on which the proceeding is based. Section 10 of the ***CJPTA*** provides that if specific circumstances are found to exist, there is a presumption that there is a real and substantial connection. There is no question that none of those enumerated circumstances are present in this case. However, s. 10 permits a plaintiff to establish that connection on the basis of other circumstances:

> 10. Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding …

[70] The circumstances that are relevant to determining whether there is a real and substantial connection in this case include the following:

> (a) AMO Canada Company is a wholly owned subsidiary of Advanced Medical Optics, Inc. Ms. Chalmers alleges that the defendants individually and jointly researched, developed, tested, manufactured, distributed and sold the Solution.
>
> (b) The negligence common issues and the punitive damages common issue are the same issues that would have to be considered in litigation against the defendants in individual or class proceedings in other provinces.

(c) I have determined that all of the common issues are suitable issues for certification under the ***Act*** for British Columbia residents who purchased or used the Solution and contracted AK.

[71] In ***Harrington v. Dow Corning Corp.***, 2000 BCCA 605, 193 D.L.R. (4th) 67, the Court of Appeal considered whether the existence of a certified class proceeding was relevant to the determination of whether the British Columbia courts had jurisdiction *simpliciter* in a products liability action involving breast implants. The defendants in ***Harrington*** argued, as AMO does here, that the non-resident claimants should not be permitted to piggy-back their claims on the residents' claims.

[72] Section 16(2) of the ***Act*** permits non-residents to be class members in a proceeding in British Columbia:

> (2) Subject to subsection (4), a person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.

[73] In ***Harrington***, Huddart J.A. noted, at para. 85, that this is a procedural provision that does not seek to extend the jurisdiction of British Columbia courts but "tells a court that the Legislature accepts, even encourages, a decision to include non-residents in class proceedings as a matter of public policy".

[74] The chambers judge in ***Harrington v. Dow Corning Corp.*** (1997), 29 B.C.L.R. (3d) 88 (S.C.), Mackenzie J. (as he then was), found that this Court had jurisdiction over non-resident claimants. That decision was made on the basis of the common law test

for “real and substantial connection”. The common issue in that case was whether silicone gel breast implants were reasonably fit for their intended purpose. He stated as follows at para. 18:

> The demands of multi-claimant manufacturers’ liability litigation require recognition of concurrent jurisdiction of courts within Canada. In such cases there is no utility in having the same factual issues litigated in several jurisdictions if the claims can be consolidated. I do not think that *Nitsuko* and *Con Pro* stand in the way of concurrent jurisdiction as they do not deal with claims inside and outside the province which raise the same common issue. It is that common issue which establishes the real and substantial connection necessary for jurisdiction. [italics in original; underline added]

[75] The Court of Appeal upheld the chambers decision. Its decision to do so was based on a consideration of the circumstances that exist in product liability cases and the values that underlie conflict of laws principles. While the decision predates the ***CJPTA***, the comments of Huddart J. at paras. 92, 97 and 99 are relevant here:

> In this case, the alleged wrongful acts are defective manufacture or failure to warn. When a manufacturer puts a product into the marketplace in any province in Canada, it must be assumed that the manufacturer knows the product may find itself anywhere in Canada if it is capable of being moved. As I suggested earlier in these reasons, it is reasonable to infer that a manufacturer of a breast implant knows that every purchaser will wear that implant wherever she resides, and that if the implant causes injury then the suffering will occur wherever she resides, and require treatment in that location. By the action of sale, the manufacturer risks an action in any province. In these circumstances, there can be no injustice in requiring a manufacturer to submit to judgment in any Canadian province.
>
> ….
>
> The appellants acknowledge the jurisdiction of British Columbia courts to determine the claims of at least those resident and non-resident class members implanted in British Columbia. They are defending the class action. I have found that the British Columbia courts have jurisdiction to determine the claims of all residents. I accept that presence in the jurisdiction for the purpose of the defence of one claim does not create

> presence in the jurisdiction for the purpose of the prosecution of another independent claim. However, I do not accept that proposition as precluding a court from taking account of that presence for the purpose of determining whether the existence of a certified class action with a common issue provides a real and substantial connection between the province and the subject matter of the claim that a non-resident seeks to have resolved in the same class proceeding.
>
> ….
>
> To permit what the appellants call "piggy backing" in a class proceeding is not to gut the foundation of conflict of laws principles. Rather, as I have tried to explain, it is to accommodate the values underlying those principles. To exclude those respondents who do not reside in British Columbia from this action because they have not used the product in British Columbia would, in these circumstances, contradict the principles of order and fairness that underlie the jurisdictional rules. By opting-in the non-resident class members are accepting that their claims are essentially the same as those of the resident class members. To the extent the appellants can establish they are not, they can be excluded by order of the case management or trial judge upon application.
>
> [emphasis added]

[76] AMO has argued that ***Harrington*** is not authority for the proposition that the Court should certify every putative product liability claim. It says that the circumstances of this case are distinguishable from ***Harrington***. I disagree. The existence of the certified proceeding in British Columbia is a relevant factor in this case. If the non-residents opt in, they accept that their claims are "essentially the same" as those of the resident class members. The fact that there are fewer class members in this case than in ***Harrington*** does not change the analysis. The alleged wrongful act is the defective design and manufacture of the Solution. AMO placed the Solution in the marketplace throughout Canada. In doing so, it knew that it risked action being taken against it in any province. There is no injustice in requiring AMO to submit to the jurisdiction of the courts of British Columbia.

[77] The only other consideration is whether ***Harrington*** no longer applies in British Columbia due to the passage of the ***CJPTA***. That argument cannot be accepted. The reasoning in ***Harrington*** is applicable under the ***CJPTA***. Section 10 does not limit the type of circumstances that may constitute a real and substantial connection. The analysis of Huddart J. is equally applicable to a consideration of the test established pursuant to ss. 3(d) and 10 of the ***CJPTA*** as it was to the common law test.

[78] The last stage of this analysis is to determine if this Court should decline to exercise its territorial competence because the court of another state is a more appropriate forum in which to hear the proceeding. Section 11 of the ***CJPTA*** sets out the proper approach to this issue:

> 11. (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
>
> (b) the law to be applied to issues in the proceeding,
>
> (c) the desirability of avoiding multiplicity of legal proceedings,
>
> (d) the desirability of avoiding conflicting decisions in different courts,
>
> (e) the enforcement of an eventual judgment, and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[79] While AMO argues that this Court should decline to exercise its territorial competence, it has not put forward an alternate jurisdiction that is more appropriate for hearing the proceeding. In essence, its position is that for every non-resident claimant, his or her province of residence is the appropriate forum.

[80] This argument requires consideration of the circumstances set out in s. 11(2) of the ***CJPTA***. It is readily apparent that those factors favour a certification that includes non-residents:

(a) The aggregation of claims, including non-residents, provides economies of scale that will reduce the costs for all parties. While there is some inconvenience for the non-resident class members, they will weigh that inconvenience when deciding whether to opt in.

(b) AMO has not put forward any evidence to show that the law to be applied will be a factor of any significance on either the negligence common issues or the punitive damages common issue. The comments of the court in ***Nantais v. Telectronics Proprietary (Canada) Ltd.*** (1995), 129 D.L.R. (4th) 110 at 114, 25 O.R. (3d) 331 (Ont. Ct. J. (Gen. Div.)), are applicable here:

> On a more practical level it is argued that a court attempting to try this class proceeding will face a multiplicity of laws from all of the provinces which may confuse the matter. This argument in my view is largely speculative. I am not aware of any difference in the law respecting product liability or negligence in the common law provinces and I have not been shown that there is any real difference between the common law on this matter and the law in the Province of Quebec.

(c) The inclusion of non-residents will make it possible to reduce or avoid multiplicity of proceedings.

(d) The inclusion of non-residents will reduce the possibility of conflicting decisions in different courts.

(f) Certification of national class actions promotes the fair and efficient use of resources within the Canadian legal system as a whole. It encourages co-operation between the provinces and reduces the number of individual and class proceedings involving a single product.

[81] AMO also argues that the inclusion of non-resident claims will mean it may have to defend multiple claims from the same individual. It says that a non-resident class member may be able to make a claim in their own province similar to the ***BPCPA*** claims made by British Columbia residents in this action. This is not a serious issue. Pursuant to s. 16(2) of the ***Act***, each non-resident class member will have to opt in to these proceedings. They will be required to commit themselves to be bound by them. That commitment will be clearly set out in the Notice of Certification and the opt-in form. Consequently, non-residents who choose to opt in will be required to refrain from pursuing any other litigation related to use of the Solution.

[82] In summary, I conclude that this Court has territorial competence over the claims of non-residents. This extends only to the two negligence common issues and to the punitive damages common issue, not to the ***BPCPA*** common issues, which are unique to British Columbia residents. In my view, there is no basis to decline to exercise jurisdiction in favour of the courts of another province.

Issue 4. Is a class proceeding the preferable procedure for fair and efficient resolution of the issues?

[83] AMO argues that individual actions, with a possible test case, are preferable to a class action proceeding. It makes this argument on three bases. First it says that the two negligence common issues will not appreciably advance the liability inquiry. Second, it says that the class size is so small that individual actions are preferable. Third, it says that the individual issues predominate such that the common issues will be overwhelmed.

[84] The first argument is easily answered. It is not necessary that resolution of the common issues be sufficient to resolve liability. Rather, they have to be issues that move the litigation forward: ***Campbell v. Flexwatt Corp.*** (1997), [1998] 6 W.W.R. 275 at para. 53, 44 B.C.L.R. (3d) 343 (C.A.).

[85] In my view, the need to resolve these issues and the importance of doing so in a way that settles the liability question for all claimants cannot be seriously questioned. AMO's own argument supports the proposition that a resolution of the negligence common issues will move the litigation forward. It put forward the following proposal in its written submissions that recognizes the importance of a resolution of the common negligence issues:

> AMO submits that a test case on common issues relating to negligence (common issues a. and b.) would be a more practical and efficient means of resolving the claims in this case. In particular, a test case (for example, Ms. Chalmer's case) on these issues would permit court to hear expert evidence, and adjudge AMO's liability on questions of general causation, duty to warn, and standard of care. In this regard, AMO will undertake to the court to be bound by the result of the test case in respect of all persons in British Columbia who assert that the use of the solution caused them to contract AK.

[86] The real issue here is the question of preferability. Is a class action the preferable way to tackle these issues?

[87] In ***Bouchanskaia v. Bayer Inc.***, 2003 BCSC 1306 at para. 150, Gray J. set out a list of considerations which inform the preferability analysis:

> (a) Whatever limitation period is found to be applicable to the claim is tolled for the entire class (s. 39);
>
> (b) A formal notice program is created which will alert all interested persons to the status of the litigation (s. 19);
>
> (c) The class is able to attract counsel through the aggregation of potential damages and the availability of contingency fee arrangements (s. 38);
>
> (d) A class proceeding prevents the defendant from creating procedural obstacles and hurdles that individual litigants may not have the resources to clear;
>
> (e) Class members are given the ability to apply to participate in the litigation if desired (s. 15);
>
> (g) The action is case managed by a single judge (s. 14);
>
> (h) The court is given a number of powers designed to protect the interests of absent class members (s. 12);
>
> (i) Class members are protected from any adverse cost award in relation to the common issues stage of the proceeding (s. 37);
>
> (j) In terms of the resolution of any remaining individual issues, a class proceeding directs and allows the court to create simplified structures and procedures (s. 27);
>
> (k) Through the operation of statute, any order or settlement will accrue to the benefit of the entire class, without the necessity of resorting to principles of estoppel (ss. 26 & 35).

[88] Virtually all of these considerations are applicable to the present case and favour a class proceeding as the preferable procedure. The economic benefits to the class

members and the case management advantages to the class are such that a class action would be preferable to AMO's proposed procedure of having individual actions with a possible test case.

[89] With regard to AMO's second argument, that the class size is so small that individual actions are preferable, I disagree. While I may have come to that conclusion if there were only two or three claimants, I have concluded on the basis of all of the evidence before the Court that there are likely many more potential class members. Even if the class includes only British Columbia residents, the class will likely include between 6 and 20 individuals. However, I have decided the class definition can include non-residents. As a result, the total number of class members may be much larger.

[90] A similar argument was made in ***Bouchanskaia***. Madam Justice Gray found in circumstances similar to those in this case that the class size, while a factor, was not a reason to deny certification. Her comments at para. 149 are applicable here:

> Joinder of a few common claims may be the appropriate procedure for a very small class, such as one involving two or three claimants. Here, the potential class size is more significant. It may be that in the aggregate the claims of the class members will be substantial. That cannot be determined at this stage.

[91] In support of its third argument, AMO identifies the following as individual issues, which it says predominate over the common issues:

a) Did the physician who prescribed contact lenses discuss the risk of AK and issues of contact lens hygiene?

b) How long did the plaintiff use the Solution?

c) Did the plaintiff read and observe the directions for use on the package?

d) Did the plaintiff engage in any behaviour associated with AK risk?

e) Was the plaintiff exposed to any other known risk factors such as previous eye injuries, ditch water, soil, etc.

f) Was there a definitive diagnosis of AK, and if so, how was the diagnosis confirmed?

g) Were there delays or errors in diagnosis?

h) Are there issues of contributory negligence or claims against third parties?

i) What are the circumstances relating to individual damages?

[92] It is readily apparent from this list that most of these individual issues raise questions about contributory negligence or quantification of damages. None of these issues is likely to overwhelm the inquiry into the common questions. The questions raised by AMO represent the kind of questions that must routinely be answered once a class action reaches the individual damage assessment phase. No matter how these claims proceed, these questions will need to be answered but the inquiry into these issues will not impair the efficacy of having the common questions dealt with in a class proceeding.

[93] The one aspect of the individual issues that is somewhat different from the usual products liability class action is the need to inquire into questions that touch on causation. There may be some individual aspects to the causation question. However,

it is likely that a full exploration of the common issues will clarify the need to examine individual causation questions. To the extent that such areas need to be explored, there is no disadvantage to doing so as part of the individual inquiry into damages and contributory negligence. Indeed, the causation issues will be closely tied to contributory negligence issues.

[94] In summary, the common negligence questions will appreciably advance the litigation. It is preferable that the common issues be dealt with by way of a class action. The common issues will not be overwhelmed by the individual issues.

Issue 5. Has Ms. Chalmers produced a workable plan for the proceeding?

[95] AMO says that Ms. Chalmers' proposed litigation plan is not workable because it does not provide a mechanism to prove personal injury damages or confirm individual diagnoses of AK before hearing the common issues trial. AMO says that this approach is unacceptable because it leaves an integral part of each putative class member's case dormant during a time when those parties should be collecting and preserving evidence.

[96] In my view, AMO's objections to the proposed litigation plan are not meritorious. I have already decided that consideration of the common issues will advance the litigation in a significant way. There can be no suggestion that hearing the common issues before resolving the individual issues identified by AMO will result in class members delaying or ignoring the collection and preservation of evidence in relation to their individual claims. Any class member who does this will know that it is done at his or her own peril. Ultimately, each member will have to show a valid diagnosis and

prove damages. There is no good reason to postpone the common issues to deal with the individual issues identified by AMO.

[97] Ms. Chalmers' proposed litigation plan is based on other plans that have been previously approved by this Court. While it is somewhat general, it can be reviewed and modified, as necessary, by the parties or through the Case Management process. At present, it is sufficient to support the certification application.

SUMMARY

[98] For the reasons given, Ms. Chalmers' application to certify this proceeding as a class proceeding is granted for residents and non-residents who contracted AK after using the Solution. Ms. Chalmers has, at this juncture, not provided the Court with evidence pertaining to the other two subclasses included in her proposed class definition. She is at liberty to do so on further application.

[99] I have concluded that Ms. Chalmers is an appropriate representative plaintiff for this class proceeding and that she has proposed a workable litigation plan. All of the common issues that Ms. Chalmers proposed are suitable for certification under the ***Act*** for British Columbia residents. The negligence common issues and the punitive damages common issue are also suitable for non-residents.

"Butler J."