COURT FILE NO.: 99-CV-181819 CP
DATE: 20070905

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Kathryn Anne Taylor	)	***Kirk Baert, Celeste Poltak, John Legge*** and
	)	***Patrick Orr*** - - for the plaintiff
	)	
Plaintiff	)	
	)	
	)	
- and -	)	
	)	
	)	
Her Majesty the Queen in Right of Canada as represented by The Minister of Health, the Attorney General of Canada	)	***Paul Evraire Q.C., James Soldatich, Sadian Campbell, Susan Keenan*** and ***Adam Rambert*** - - for the defendant
	)	
	)	
Defendant	)	
	)	
- and -	)	
	)	
University Health Network (formerly Toronto General Hospital), and Dr W. Dobrovolsky	)	***James Newland*** - - for the Ontario Health Insurance Plan
	)	
Third Parties	)	
	)	
	)	
	)	**HEARD:** July 23, 24, and 25, 2007

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

CULLITY J.

[1] The plaintiff moved to certify this action against her Majesty the Queen in Right of Canada under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). I was told that the claims and the causes of action

pleaded are similar to those in more than 30 other proceedings that were formerly under the case management of Winkler J. (now Winkler C.J.O.). In these cases, damages and declaratory relief are sought against various defendants for injuries caused by the insertion of implants ("TMJ implants") in the temporomandibular joints in the jaws of the respective plaintiffs. The claims in this action relate only to the conduct of Crown's servants in connection with the importation, sale and distribution of such implants.

History of the proceeding

[2] This action was commenced in December 1999 by Judith Logan. For reasons released on February 13, 2003 ([2003] O.J. 418 (S.C.J.), Winkler J. permitted Ms Logan to be replaced by Kevan Drady and the present plaintiff, Kathryn Taylor. This decision was upheld by the Court of Appeal: (2004), 71 O.R. (3d) 451.

[3] By virtue of a further order of this court, Mr Drady was removed as a co-plaintiff and, on March 3, 2006, he commenced a separate class action ("*Drady*") against the Crown in respect of specific kinds of TMJ implants that were not necessarily the same as those received by Ms Taylor.

[4] On July 16, 2007, the Crown’s motion to strike the statement of claim in *Drady* for failure to disclose a reasonable cause of action was granted: [2007] O.J. No. 2812 (S.C.J.). Substantially the same submissions were relied on by counsel for the Attorney General in opposing certification in this case in the context of section 5 (1) (a) of the CPA.

Vitek TMJ implants

[5] Although a number of the factual allegations in the statement of claim are not so restricted, the claims made by the plaintiff on behalf of the class relate only to implants manufactured by Vitek Inc. - a US corporation. Expert evidence in affidavits delivered on behalf of the Attorney General indicates that these implants contained a complex mixture of various materials manufactured by Vitek Inc. under the trademark “Proplast”. Proplast was designed to have high porosity so that it could be easily integrated into living tissue by enabling cells to grow into the porous composite material. A number of standard types of the composites were made with their chemical and physical properties differing according to the materials used and the manufacturing processes. All these types had in common certain resin and fibres that are said to "dominate their surface properties and form the porous matrix”.

[6] In some respects - reflecting, no doubt, the history of the proceeding and the use of pleadings in other implant cases as precedents - the statement of claim gives rise to difficulties of interpretation. Paragraph 8 of the statement of claim states that the action relates to devices that are referred to in the pleading as "Vitek TMJ implants". Although, in paragraphs 11 and 13, it is pleaded that, to the knowledge of the Crown, Vitek Inc. was importing and selling Proplast implants from 1968, these are not described as Vitek TMJ implants. The allegations with respect to the latter are made in paragraph 33 of the statement of claim and in the paragraphs that follow.

[7] In paragraph 33 it is alleged that Vitek TMJ implants - the implants with which the action is concerned - were being marketed in the United States on a clinical trial basis in May 1983 when Vitek Inc. advised Health Canada of its intention to export to this country. It appears to follow that, on a plain reading of the pleading - and notwithstanding some references to earlier dates - the plaintiff's claims relate only to implants imported and distributed in Canada in, or after, May 1983 and that only the conduct of the Crown in connection with such implants is in question.

Certification

[8] Each of the requirements for certification in section 5 (1) of the CPA must be satisfied. Evidence is admissible to establish "some basis of fact" for the requirements in section 5 (1) (b) through (e). The requirement in section 5 (1) (a) must be resolved on the pleading in accordance with essentially the same principles as were applicable in *Drady* for the purposes of the Crown's motion under rule 21.01 (1) (b). In consequence, the plain and obvious test propounded by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 is to be applied, reading the pleading generously and on the assumption that all facts alleged - other than those that are manifestly incapable of proof - will be proven at trial.

Section 5 (1) (a): disclosure of a cause of action

[9] As in *Drady*, the plaintiff seeks compensation, declarations and mandatory orders in respect of the alleged negligence of employees of the Crown and their alleged breaches of fiduciary duties and section 7 of the *Canadian Charter of Rights and Freedoms*. In most material respects, the statements of claim are virtually identical - the principal, and potentially significant, difference being Ms Taylor's assertion that the implant she received was of a specific kind to which most of the particulars of the Crown's alleged negligence relate. There was no similar allegation in *Drady*. However, to the extent that the pleading and the submissions of

counsel were substantively identical, I will adapt some of the comments I made for the purposes of that case.

[10] Initially, however, it is necessary to deal with the submission of plaintiff's counsel that the decisions of Winkler J., and that of the Court of Appeal, in *Logan*, have already decided the questions that arise under section 5 (1) (a).

[11] In considering the proposed substitution of Kevan Drady and Kathryn Taylor for Judith Logan, Winkler J. noted at the outset:

> The Attorney General opposes the motion on numerous grounds, including assertions that the proposed substitution is in effect the commencement of a fresh action; the claims of Drady and Taylor are not tenable in law; and, that the purpose of the order sought is to defeat the limitations defence. The Attorney General also seeks to dismiss the action on a cross-motion. (para 3).

[12] In paragraph 8 he stated his conclusion:

> With respect to the two new proposed representative plaintiffs, Drady and Taylor, they have persuaded me that they have a tenable claim at law. As a result, the motion to add them as representative plaintiffs is granted. My reasons follow.

[13] In the paragraphs that follow, the question whether the claims of Mr Drady and Ms Taylor were untenable at law was related almost entirely to the possibility that they were statute-barred on the ground of limitations. After stating that he did not agree that the claims were untenable at law on that ground, the learned judge continued in paragraph 15:

> The statement of claim in the present proceeding contains, in addition to the allegations of negligence, allegations of a continuing breach of fiduciary duty and breach of Charter rights by the defendant. Counsel for the Attorney General concedes that, although it is unclear in his view as to whether a claim for breaches of this nature can be brought against the Attorney General, he is not in a position to argue that these claims are not tenable at law at this stage of the proceeding. I agree. (see *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at 980.) He argues however, that s. 7 of the *Public Authorities Protection Act* ... operates so as to bar these claims and is therefore not tenable. I cannot accede to this submission. It is at least arguable that s. 7 does not apply to these claims for various reasons, including that the legislation does not apply to equitable claims sounding in breach of fiduciary duty and

> that the present claims are alleged to be of a continuing nature ... Further, it is settled law in Ontario that s. 7 does not operate as a bar to claims based on allegations of Charter violations. ... In light of these issues it would not be appropriate to find that these claims are untenable at this stage of the proceeding ...

[14] The rest of the judgment is confined mainly to the limitations issues and, in the Court of Appeal, references to the tenability of the claims were similarly directed to those issues. At paragraph 16, Feldman J.A. stated:

> The second argument is that, on their face, the actions of the substituted plaintiffs in respect of the negligence claims are out of time, and there is no reliance on an extension because of discoverability issues. This argument was addressed by the motion judge. The claim includes not only negligence but ongoing breach of fiduciary duty and *Charter* breaches. The claim also alleges that the appellant's breaches, including negligence, are continuing. Therefore, it is not clear that any of the claims are untenable.

[15] Although plaintiff's counsel submitted that paragraph 15 of the reasons of the Chief Justice, with its reference to *Hunt*, indicates that he intended to hold that the plaintiffs had adequately pleaded causes of action for negligence, breach of fiduciary duty and breach of section 7 of the Charter, it is not clear to me that the concession of the Attorney General to which the paragraph refers related to anything more than some argument based on Crown immunity. It is, *ex facie*, unlikely that, without argument (as I understand), and without any discussion of the issues relating to each of the three causes of action, Winkler J. intended to dispose of them. They were argued at length at the hearing of this motion and, with some hesitation, I will proceed on the basis that he did not intend to do so.

(a) negligence

[16] It is alleged that, on April 22, 1988, Ms Taylor received a Vitek TMJ implant. She claims to have suffered catastrophic and irreversible adverse biomedical consequences that resulted in permanent total disability and loss of enjoyment of life. These injuries she attributes to the negligence of Crown employees when under an obligation to exercise their powers and responsibilities pursuant to the *Food and Drug Act*, S.C. 1952 - 53, c. 38 (“FDA”). It is alleged that employees of the Ministry of Health ("Health Canada") were, or ought to have been, aware that the implants were being imported and sold in Canada for the purpose of insertion into the temporomandibular joints in the jaws of patients and that any TMJ implants then used were prone to mechanical deterioration and

disintegration causing severe and potentially catastrophic physiological reactions when inserted.

[17] In view of this reasonable forsight of harm, it is claimed that the Attorney General, through its servants, breached a private law duty of care:

(a) by not preventing the importation and sale of the implants;

(b) by making regulations pursuant to its statutory powers negligently;

(c) by not exercising its statutory and regulatory powers to require Proplast labelling, and compliance with the regulations in other respects;

(d) by not warning health care professionals and the potential recipients of the risks attaching to the devices;

(e) by not monitoring the consequences of the insertion of the implants; and

(f) by not "remediating" the injuries suffered.

[18] These breaches of duty are attributed to the Minister of Health and the employees of the department now known as Health Canada in the purported exercise of statutory powers under the FDA.

[19] It is accepted that, in determining whether a Minister, or other governmental body exercising statutory powers, has a private law duty of care, the starting point must be a consideration of the provisions of the relevant statutes. While the existence of such a duty need not be stated explicitly in the statute, its provisions must be examined for

> ... factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to their relationship to impose a duty of care upon the defendant: *Cooper v. Hobart*, [2001] 3 S.C.R. 537, para 34.

[20] By the same token, such an examination may reveal that a private law duty may be negated by inferences from the statute that any duties that are imposed are owed to the public, and not to private individuals.

[21] The provisions of the FDA are administered by the Minister of Health and it may well be appropriate to read them in the light of the general policies and duties of the Minister under the *Canada Health Act*, R.S.C. 1985, c. C-6 and the *Department of Health Act*, S.C. 1996, c. 8. These include the protection, promotion and restoration of the physical and

mental well-being of Canadian residents, and their protection against risks to their health.

[22] The emphasis in the relevant provisions of the FDA is almost entirely on duties imposed, not on Health Canada, but on the manufacturers, importers and vendors of medical and surgical devices.

[23] From 1953 to the present time, the structure and general effect of the FDA has remained unchanged. It is concerned essentially with prohibiting the advertisement or sale of food, drugs, cosmetics or "devices" in specified circumstances, and providing for the enforcement of its provisions by inspectors to be appointed by Health Canada. The Minister has extensive discretionary powers relating to the enforcement and, under the existing provisions, to the provision and refusal of certificates of compliance. Throughout the period, "devices" have been defined to include any instrument, apparatus or contrivance sold or represented for use in the treatment or mitigation of a disorder, abnormal physical state or the symptoms thereof.

[24] At all material times the Governor in Council has been empowered to make regulations for carrying out the purposes and provisions of the Act into effect, including regulations:

(a) respecting the advertising of devices to prevent consumers from being misled as to their safety and to prevent injury to their health;

(b) prescribing standards of composition for devices;

(c) respecting the importation of devices in order to ensure compliance with the Act and the regulations;

(d) respecting the method of preparation of devices in the interests of, or for the prevention of injury to, the health of consumers;

(e) requiring persons who sell devices to maintain such books and records as the Governor in Council considers necessary for the proper enforcement and administration of the Act and the regulations;

(f) prescribing the conditions of manufacture, including the qualifications of technical staff in respect of devices;

(g) respecting the powers and duties of inspectors and analysts and the taking of samples and the seizure, detention, forfeiture and disposition of articles; and

(h) exempting any device from any of the provisions of the Act, and prescribing the conditions of such exemptions.

[25] There are no provisions of the FDA that expressly purport to impose either public or private duties on Health Canada. Sections 19 - to 21 of the present Act - which are materially identical to sections 18 - 20 of the statute enacted in 1953 - provide as follows:

19. No person shall sell any device that, when used according to directions or under such conditions as are customary or usual, may cause injury to the health of the purchaser or use thereof.

20. (1) No person shall label, package, treat, process, sell or advertise any device in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its design, construction, performance, intended use, quantity, character, value, composition, merit or safety.

(2) a device that is not labelled or packaged as required by, or is labelled or packaged contrary to, the regulations shall be deemed to be labelled or packaged contrary to subsection (1).

21. Where a standard has been prescribed for a device, no person shall label, package, sell or advertise any article in such a manner that it is likely to be mistaken for that device, unless the article complies with the prescribed standard.

[26] Although the relevant provisions of the FDA have not changed significantly since its original enactment, the regulations made pursuant to it have been expanded considerably. Until the Medical Devices Regulations of September 2, 1976, were made, manufacturers and vendors had no obligation to provide information to Health Canada before importing or selling devices. After April 1, 1976, Health Canada was to be provided with a notification containing prescribed information within 10 days of the first sale of a device. Evidence of the safety and effectiveness of devices was not, however, required unless requested by Health Canada until 1983 when the sale of new devices was prohibited unless a notice of compliance had been obtained from the Department. For that purpose, prescribed evidence of the safety of the device was required.

[27] In *Drady* I referred to the decision of the Divisional Court in *Klein* v. *American Medical Systems Inc*., [2006] O.J. No. 5181 (Div.Ct.) and that in *Attis v. Canada (Minister of Health*), [2007] O.J. No. 1744 (S.C.J.) in which the Attorney General's motions to strike a claim for negligence were successful on the ground that neither the FDA, nor the facts pleaded, gave rise to a private law duty of care. In particular, I adopted and applied the analysis of Winkler J. in *Attis* who held that Health Canada’s failure to prohibit the importation and sale of medical devices was essentially a

failure to regulate or govern and manifestly a matter of policy. I distinguished the decision of Pearce J. in *Baric v. Tomalk*, [2006] O.J. No. 890 on the ground that I have referred to above - that it was not pleaded that Mr Drady received the type of implants to which the specific allegations of negligence related.

[28] In *Drady* I referred, also, to the fact that, under the FDA and the regulations, Health Canada does not regulate devices generically or by categories. Its powers and responsibilities are confined to dealing with particular devices sold, or to be sold, in Canada on a case-by-case basis. The Crown's alleged negligence in respect of the defaults of the Vitek TMJ implant distributor could not in my opinion create proximity with Mr Drady if it was not alleged that he received such a device. It appeared to me that, while the absence of a close causal connection between a defendant's conduct and the harm suffered by a plaintiff may not always be fatal to a claim of proximity, it was essential on the facts of *Drady*. In my judgment, the scope of any duty of care that might exist between the Crown and recipients of a product to which Health Canada's conduct related would not extend to a person who did not receive that product.

[29] The distinction I relied on in *Drady* is not present in this case. Ms Taylor received one of the Vitek TMJ implants to which the specific allegations against Health Canada relate. It was pleaded that:

(a) at all material times, Health Canada represented that it took a lead role in alerting the public to safety concerns with medical devices;

(b) at all material times, Health Canada was aware that dentists, oral surgeons, and other users of medical devices, hospitals and patients assumed that all medical devices available on the Canadian market had been approved by Health Canada for sale in Canada;

(c) members of the public relied on Health Canada to implement its policies and the FDA;

(d) Health Canada represented that a notice of compliance meant that it was satisfied that the manufacturer had carried out tests and had submitted appropriate results to Health Canada to demonstrate a reasonable probability of the safety and effectiveness of the devices when they were implanted in humans;

(e) Health Canada has a responsibility to prohibit unlawful devices and to provide effective notice to hospitals, medical practitioners,

dental practitioners, pharmacists and other healthcare providers through official channels that hazardous or dangerous devices are in circulation or in use;

(f) in May, 1983, Health Canada was advised by Vitek Inc. of its intention to export Vitek TMJ implants to Canada. The implants were then being marketed in the United States on a clinical trial basis;

(g) Vitek Inc. and, subsequently, the proposed distributor of the implants in Canada, were advised by Health Canada that a notice of compliance was required. No such notice was ever issued;

(h) thereafter, Health Canada was aware that Vitek implants were being imported and sold in Canada without notices of compliance or compliance with the importer's obligation to provide prescribed information relating to their safety;

(i) after Vitek and the distributors of the implants had been told by Health Canada that a notice of compliance was required, no steps were taken by Health Canada to enforce the requirement when it was aware that the devices continued to be sold in Canada;

(j) similarly, after a request for a notice of compliance had been rejected in 1987, Health Canada took no steps to intervene when it had knowledge that sales were continuing;

(k) when Health Canada's requests for further compliance with the Medical Device Regulations received no response from the distributor of the implants, Health Canada took no action;

(l) in 1988 Health Canada's internal database recorded erroneously that a notice of compliance had been issued in respect of Vitek implants and this misinformation was disseminated in April 1989 by Health Canada to manufacturers, distributors and others on its mailing lists. It was also consulted prior to an inspection of the distributor’s records;

(m) when the mistake in the computer database was subsequently discovered, Health Canada took no steps to inform professional dental associations, surgeons and hospitals of the error; and

(n) in the period between 1990 and 1994, Health Canada received numerous reports and communications from health authorities in the United States that Vitek implants and TMJ implants generally

were unsafe but did not act on this information or disseminate it widely among dental professionals prior to 1994 when the further importation of the implants was banned.

[30] In the light of substantially the same allegations, Pierce J. in *Baric* found that it was not plain and obvious that a private law duty of care had not arisen. I am of the same opinion on the facts pleaded in this case.

[31] In *Cooper*, when analysing the test for determining the existence of a duty of care, the Supreme Court of Canada placed emphasis on the following considerations among others:

1. the distinction between statutory duties owed to the public and those owed to private individuals;

2. the distinction between policy decisions and operational decisions; and

3. residual overriding policy reasons for denying a duty of care.

[32] While the first of these considerations was regarded as relevant to the question of proximity between the plaintiff and defendant, the second and third were considered to come into play only if proximity and a *prima facie* private law duty of care were established. As, however, the distinction between policy decisions and operational decisions was said (at para 38) to relate to an immunity of the Crown, there appears to be no reason why it should not be considered at the outset. In this case, I have not found it possible to separate completely an inquiry into the question of proximity from policy considerations. It was recognized in *Cooper* (at para 51) that some such considerations can be involved in determining whether proximity may exist.

[33] FDA does not impose specific duties on Health Canada with respect to the importation and sale of medical devices. It confers powers to enforce duties imposed on importers, vendors and distributors. The powers are intended to implement policy decisions of the legislature. Any duty to exercise the powers is owed to the public and not to private individuals: *cf*., *Cooper*, at paras 49-50. In consequence, proximity will be excluded and a failure to exercise the powers will not, by itself, engage a private law duty of care.

[34] Where, however, Health Canada takes steps to implement the policy in the FDA by purporting to exercise its statutory powers, it will be acting operationally and "may be liable for the manner in which it executes or carries out the policy": *Cooper*, at para 38.

[35] Decisions of Health Canada pursuant to its statutory powers may involve "second-tier" policy considerations relating to the availability and allocation of resources

[36] The relevance of the distinction between acts that fall within, and those that fall outside, the scope of discretionary powers conferred by statute was affirmed by Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) when considering the powers of local authorities under the *Public Health Act*, 1936 (U.K.). He stated:

> Undoubtedly [the statute] lays out a wide area of policy. It is for the local authority, a public and elected body, to decide upon the scale of resources which it can make available in order to carry out its functions under Part II of the Act - how many inspectors, with what expert qualifications, it should recruit, how often inspections are to be made, what tests are to be carried out, must be for its decision. It is no accident that the act is drafted in terms of functions and powers rather than in terms of positive duty. As was well said, public authorities have to strike a balance between the claims of efficiency and thrift: whether they get the balance right can only be decided through the ballot box, not in the courts.
>
> ... There may be a discretionary element in [the exercise of a decision to inspect] - discretionary as to the time and manner of the inspection, and the techniques to be used. A plaintiff complaining of negligence must prove, the burden being on him, that action taken was not within the limits of a discretion bona fide exercised, before he can begin to rely upon a common law duty of care. But if he can do this, he should, in principle be able to sue. (at pages 754-5)

[37] Similarly, in *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, where the City had not taken steps to enforce a stop order it had issued, Wilson J. stated:

> I do not think the appellant can take any comfort from the distinction between non-feasance and misfeasance where there is a

duty to act or, at the very least, to make a conscious decision not to act on policy grounds. In my view, inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion. (at page 24)

> [38] The allegations pleaded in this case do not in my opinion support a conclusion that the conduct of Health Canada's officials involved policy decisions on their part. Obviously the dissemination of the erroneous information that a notice of compliance had been issued cannot fall into that category, although there is no claim for negligent misrepresentation as such. Their failure to follow up on their repeated communications that the distributor was in breach of its obligations under the FDA, are in my opinion, more consistent with a failure to exercise their statutory discretions – an abuse of discretion - than with decisions duly made within the ambit of their discretion.
>
> [39] The allegations are consistent with an interpretation that Health Canada's failure to take steps to enforce the regulations and its directions to the distributor of the devices - despite its knowledge that they were being breached - facilitated the continued sale of the devices and thereby created a risk to the health of the intended recipients. Health Canada's alleged failure to enforce the regulations when it was aware that sales of the implants were continuing after it had given notice of breaches on a number of occasions over a period of six or seven years, could only have encouraged the importer/distributor to believe that it could ignore its statutory obligations, and Health Canada's warnings, with complete impunity. In these circumstances, I believe it would be open to a court to find that Health Canada's course of conduct – including the dissemination of the misinformation in its database - increased the risk to the health of the plaintiff and other potential recipients of the implants and gave rise to a relationship of proximity with them.
>
> [40] It is possible that the plaintiff will not be able to prove the allegations of fact in the statement of claim - or that a different complexion may be placed on them when all the evidence on each side is before the court at trial. These are not matters I am concerned with on this motion. On the basis of the pleading alone, I do not consider it to be plain and obvious that Ms Taylor has no chance of success in establishing that a relationship of proximity – as required to establish a private law duty of care – existed in connection with operational acts of Health Canada. I believe this conclusion is consistent with the cases I have cited, and others such as *Sauer v. Canada (Attorney General)*,[2007] O.J. No. 2443 (C.A.); *Swanson Estate v. The Crown* (1991), 80 D.L.R. (4th) 741 (F.C.A.); and *Williams v. Canada (Minister of Health)* (2005), 76 O.R. (3d) 763 (S.C.J.)

[41] Counsel for the Attorney General submitted that, in the event that I found that proximity and a *prima facie* duty of care can arise from the facts pleaded, there were still residual policy considerations of the kind discussed in *Cooper* that would negate the duty. In their factum, they describe such considerations as follows:

> First, such a duty would create the spectre of unlimited liability to an unlimited class.
>
> Second, recognizing ... a duty of care would effectively create an insurance scheme for devices funded by taxpayers, which, according to the legislation, its content and emphasis, was not the intention of Parliament.
>
> Third, recognizing ... a duty of care may have a negative impact on the Government's ability to balance all relevant interests when making regulatory decisions regarding devices.
>
> Fourth, recognition of the duty of care is not consistent with the societal interest to promote advances in medical science and technology.
>
> Fifth, recognizing ... a duty of care in these circumstances may open the door potentially to innumerable claims in any number of similar type cases. If Health Canada were held liable for every adverse effect that became apparent during post-marketing surveillance, the courts would be inundated with lawsuits.
>
> Finally, recognition of a duty of care of the nature proposed by the plaintiff would create liability for devices that Health Canada does not regulate, or that Health Canada is unable to prevent from being imported and sold illegally.

[42] Given the specific facts on which I have concluded that the question of proximity should be left to a trial, I do not find counsel's submissions to be persuasive. Each of the considerations might have some significance if the issue was divorced from those specific facts and concerned an attempt to attach liability to the Crown for its servants' failure to discharge duties owed to the public. Few of them could, in my opinion, be applicable if, as I have found, the conduct of Health Canada with respect to this particular device may be considered to have enhanced the risk of injury to the potential class of recipients that included Ms Taylor. As confined to those facts, the spectres of unlimited liability, interference with the policy decisions of government and the floodgates of litigation - let alone possible liability for devices imported and sold

illegally – seem fanciful. I am satisfied that the broader considerations – such as the third and fourth – cannot properly be evaluated on the basis of the pleading alone.

[43] The above findings in respect of the claim for negligence are premised on an interpretation of the pleading that confines the claim to Vitek implants imported and distributed in Canada in, and after, May 1983. As I have previously mentioned, there are allegations in the statement of claim that, to the knowledge of the Crown, Vitek Proplast implants were imported and sold in Canada as early as 1968. The class period proposed by plaintiff's counsel in their factum, and in an affidavit of a solicitor, would commence in that year. If, contrary to the above interpretation, an appropriately generous reading of the pleading would extend the claims to Health Canada's conduct throughout the period that commenced in 1968, it would not in my opinion support the existence of proximity, or of operational acts of Health Canada, before May 1983. There are no allegations of allegedly negligent conduct of Health Canada until that time other than its failure to exercise its statutory powers when it had knowledge that the implants were being imported and used, and that they were harmful.

[44] Inaction by governmental bodies with statutory powers conferred for the protection of the public will not ordinarily engage a duty of care even though harm to individuals is reasonably foreseeable. Absent a statutory provision, or implication, to the contrary, any duty to exercise the powers will be owed to the public and not to private individuals. The missing element - proximity - may, however, be supplied if, by a course of conduct in a purported exercise of the powers, the agency creates, or contributes to, a foreseeable risk of harm to a discrete group. There is no allegation that Health Canada's employees purported to exercise their powers in connection with Vitek implants until May, 1983.

(b) breaches of fiduciary duty.

[45] The basis of a claim for breach of fiduciary duty is pleaded in paragraphs 138 - 140 of the statement of claim:

> 138. In developing policies and legislation for the establishment of regulatory systems for devices and in purporting to implement such policies by the partial and inadequate measures pleaded, the Defendants created a relationship of dependency by members of the public to the Crown. In consenting to the insertion of devices, members of the public relied upon Her Majesty to implement its expressed policies.

> 139. The Minister had a duty to the Crown to take protective measures within the ambit of the authority of the Minister of Health for Canada to ensure the health and safety of the residents of Canada.
>
> 140. The Minister was under a fiduciary obligation to the Attorney General and to the public to carefully and diligently discharge his duties in the Office of the Minister of Health for Canada and to take reasonable care that the laws for which the Minister was responsible were observed, followed and enforced.

> [46] On the same language in the statement of claim in *Drady*, I held that the functions, responsibilities and powers of the Minister and the employees of Health Canada under the FDA were not those of fiduciaries *vis-a-vis* Mr Drady. Any duties with respect to their exercise were owed to the public at large and were not private law fiduciary duties. Although, in this case, I have found that private law duties of care may have arisen from the conduct of Health Canada's employees in the exercise of their statutory responsibilities owed to the public, such conduct, without more, cannot, in my opinion, convert them, or the Crown, into fiduciaries. It may establish a link of proximity between the Crown and the plaintiff but it does not establish a fiduciary relationship. As Simpson J. stated in *Squamish Indian Band v. Canada* (2001), 207 F.T.R. 1 (F.C.T.D.), at para 521:

> ... in matters of public law, discretion and vulnerability can exist without triggering a fiduciary standard.

(c) Breach of section 7 of the Charter

> [47] Section 7 provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

> [48] As was the case in *Drady*, the plaintiff claims that the Crown’s breach of its legal obligations "as pleaded herein" constituted violations of the plaintiff's rights under section 7 and that such violations did not constitute reasonable limitations that would be justified under section 1. She claims a declaration that "these violations of the plaintiff's rights" were not in accordance with the applicable principles of fundamental or natural justice.

> [49] Paragraphs 178 -181 of the statement of claim contain the following allegations:

178. The Plaintiff states that the severe effects upon her of the breaches by the Defendants of their legal obligations to the Plaintiff are to deprive her of liberty and security of the person, contrary to S. 7 of the *Charter of Rights and Freedoms.*

179. The Plaintiff states that the disfigurement, permanent disability and chronic debilitating pain suffered by residents of Canada as a result of failure of alloplastic TMJ implants inserted in Canada has caused or contributed to the suicide of several such persons. The Plaintiff states that such suicides would not have occurred but for the breaches of legal obligations by the Defendants. As such, these persons have been deprived of life, contrary to s. 7 of the *Charter of Rights and Freedoms*.

180. The Plaintiff states that the permanent disability and chronic debilitating pain suffered by residents of Canada as a result of failure of alloplastic TMJ implants inserted in Canada has caused or contributed to the inability of persons in whom these devices have been implanted to pursue their careers and participate in society contrary to s. 7 of the *Charter of Rights and Freedoms.*

181. The Plaintiff states that the disfigurement, permanent disability and chronic debilitating pain suffered by residents of Canada as a result of failure of alloplastic TMJ implants inserted in Canada has caused or contributed to the loss of enjoyment of life of those persons in whom these devices have been implanted contrary to s. 7 of the *Charter of Rights and Freedoms.*

> [50] When asked for particulars of the persons who are alleged in paragraph 179 to have committed suicide, the unresponsive reply was that plaintiff's counsel were aware of one person who had attempted, and nearly succeeded, in doing so.
>
> [51] In *Drady*, counsel for the Attorney General submitted that, as the claims under section 7 were clearly and entirely premised on findings that Health Canada breached the private law legal duties pleaded, and, as I had made findings to the contrary, the Charter claims could not be sustained. I accepted that submission.
>
> [52] It has been recognized in the Supreme Court of Canada that the fact that the conduct of the Crown, or its servants, gave rise to liability in tort at common law would not exclude the possibility that it may also constitute a violation of section 7 of the Charter. In *Nelles v. Ontario,* [1989] 2 S.C.R. 170, Lamer J. noted that

... in many, if not all cases of malicious prosecution by an Attorney General, or Crown Attorney, there will have been an infringement of an accused's rights guaranteed by ss. 7 and 11 of the *Canadian Charter of Rights and Freedoms*. (para 46)

> [53] It does not follow that negligent conduct of Crown employees will amount to the "determinative state action" referred to by Bastarache J. in *Gosselin v. Quebec (Attorney General*),[2002] 4 S.C.R. 429, where he stated:

Individuals who find themselves subject to administrative processes may find that they have been deprived of the right to life, liberty or security of the person. The manner in which these various administrative processes will be reviewed has by no means been calcified. Nor has the interpretation of the "principles of fundamental justice" which apply to these processes. However, at the very least, in order for one to be deprived of a s. 7 right, some determinative state action, analogous to a judicial or administrative process, must be shown to exist. Only then may the process of interpreting the principles of fundamental justice or the analysis of government action be undertaken. (para 216)

> [54] No authorities were cited to me in which the question whether an individual can be deprived of her section 7 rights by the negligence of Crown servants acting operationally has been considered. To the extent that the statement of claim alleges a failure to discharge duties owed to the public and private law duties of care, there is also the question whether section 7 can impose positive obligations to sustain life, liberty or security of the person - a question that was expressly left open by McLachlin C.J. in *Gosselin*.
>
> [55] Whether or not the operational negligence of Crown servants can be considered to be determinative state action of the kind referred to in *Gosselin*, I believe I am bound to follow decisions of the Court of Appeal in which it has been held that claims to recover damages for personal injury do not engage section 7 of the Charter. In *Filip v. City of Waterloo* (1992), 98 D.L.R. (4th) 534 (C.A.), at pages 537 - 8, Catzman J.A. referred to, cited and applied:

... a formidable array of authority, in this province and elsewhere, for the proposition that the right to security of the person under s. 7 does not embrace the civil right to bring an action for the recovery of damages for personal injury ...

[56] This passage was referred to as authority for the same proposition in *Rogers v. Faught* (2002), 212 D.L.R. (4th) 366 (C.A.), para 34, where MacPherson J. A. stated:

> A civil action is economic and proprietary in nature and as such outside the range of interests protected by s. 7.

[57] It follows that I do not believe it is open to me to find that the pleading discloses a Charter right to damages for a breach of section 7.

[58] Accordingly, the plaintiff's claims are, in my judgment, sustainable – if at all - only on the ground of the tort of negligence.

Section 5 (1) (b) - the class

[59] Ms Taylor seeks to represent a class of persons defined as follows:

> All persons resident in Canada, except those residing in British Columbia or Quebec, who were implanted from 1968 to present with temporomandibular joint medical device (s), of the Vitek or Proplast type, variously known as Vitek or Vitek Proplast or Proplast or Proplast 1 or Proplast 2 ("Vitek TMJ") implants, full particulars of which labels or descriptions are known or ought to have been known to Her Majesty which include but are not limited to the following:
>
> (i) alloplastic implants of the Proplast proprietary type including implants sheeting, block Proplast, Proplast interpositional implants, and Proplast partial total joint replacements;
>
> (ii) Vitek allopplastic implants, being composite of various materials, particulars of which were known by Her Majesty at all relevant times, which materials were also known by Her Majesty to be hazardous to the health of the recipients; and
>
> (iii) alloplastic implants of the Vitek proprietary type including Vitek implant sheeting, block Vitek, Vitek interpositional implants, and Vitek partial total joint replacements, which medical devices were composed of materials of which Her Majesty had actual knowledge or ought to have had actual knowledge.

[60] Plaintiff's counsel estimated the size of the class to be approximately 2600 individuals. The evidence in support of a number this large is not persuasive. The estimate is based on information from Health Canada that 26,000 Vitek TMJ implants were distributed in the United

States and an assumption that, based simply on the relative populations of Canada and the United States, "it would not be unreasonable" to conclude that 2600 units were implanted in Canada. The information from Health Canada on which counsel relied only in part suggests that the class might not exceed 200 persons.

[61] In challenging the adequacy of the class definition, counsel for the Attorney General submitted, first, that it was too broad as it could include persons who suffered no damages from the implants and, more fundamentally, because the reactions of - and the effects on - other members were so uniquely individualistic that the class would lack commonality. I do not accept either of these criticisms of the definition.

[62] In the majority of cases that are certified under the CPA - other than those where the statutory conditions for an aggregate assessment are satisfied - a determination whether each class member has suffered damages, and the quantum of damages, will not be made at a trial of common issues. The possibility that some class members will be unable to prove damages almost invariably exists. Apart from anything else, this is the inevitable consequence of the continued insistence that class criteria cannot incorporate matters that go directly to the merits of the members' claims. The required rational connection is between the class criteria and the common issues and not between the criteria and the ultimate outcome of the proceeding for each class member: *Western Canadian Shopping Centres Inc. v. Dutton* (2001), 201 D.L.R. (4th) 385 (S.C.C.), para 38. Similarly, the statement in that case (at para 40) that success for one class member must mean success for all relates only to the resolution of the common issues.

[63] The second criticism also ignores the close connection between a class definition and the common issues. Under section 5 (1) (c), the claims of a class members must raise common issues and, if that is the case, all that is required is that the class definition employs objective criteria that will enable the court to determine whether any particular person is, or is not, a member of the class, and that the definition is not unnecessarily broad. Existence of individual issues relating to causation and the nature of the harm suffered may be relevant to the extent that a determination of the common issues would advance the litigation - or to the manageability of the proceedings - but I do not think it necessarily impacts on the adequacy of the class definition.

[64] I had some initial concern that the description of the "Vitek TMJ implants" referred to in the class definition, and in a number of the proposed common issues, provided appropriately objective and

determinative criteria. On the basis of the expert evidence, I believe this aspect of the definition is adequate.

[65] The references to Health Canada's knowledge in various parts of the definition are, however, irrelevant and, in subparagraph (ii) they beg the merits of the plaintiff's case. These references must be deleted.

[66] For the reasons already given, the class commencement date of 1968 must be changed to May, 1983. The alleged course of conduct that I have found to give rise to a relationship of proximity between the Crown and the plaintiff began then and, in my judgment, the requirement of a rational connection between the class definition and the proposed common issues relating to negligence entails that only individuals who received Vitek TMJ implants in, or after, that month can be included in the class.

Section 5 (1) (c) - common issues

[67] The plaintiff proposes the following as common issues to be tried:

(a) Did the defendant owe a duty of care to the Class Members?

(b) What was the appropriate standard of care?

(c) Did the defendant breach the standard of conduct/care expected of it and, if so, when and how?

(d) What was the defendant's knowledge with respect to the safety of Vitek TMJ implants during the relevant time period?

(e) Did the defendant have a duty to warn the Class Members of the defects and deficiencies in the Vitek TMJ implants in this proceeding?

(f) Was the defendant negligent and if so, when and how?

(g) As a matter of law, from 1968 to present, were there five (5) different regulatory time periods, as alleged by the defendant?

(i) December 8, 1954 to August 17, 1969;

(ii) August 18, 1969 to February 28, 1974;

(iii) March 1, 1974, to September 1, 1975;

(iv) September 2, 1975 to 7th October 7, 1982; and

(v) October 8, 1982, to June 30, 1998.

(h) If the answer is yes to part or all of common issue [g], does that change the answer to any of the common issues (a) through (f)? If so, how?

(i) Can the Vitek TMJ implants cause injury to the health of the implantees within the meaning of section 19 of the Food and Drugs Act?

(j) Did the Vitek TMJ implants materially cause or contribute to various medical complications suffered by the class, including, but not limited to, the medical complications enumerated in the fresh as amended statement of claim?

(k) In light of the answers to the common issues, can the Court make an aggregate assessment of the damages suffered by all class members as part of a common issues trial?

(l) If the defendant's liability is established, did its conduct justify an award of punitive damages to the class and if so, what amount of those damages is appropriate? and

(m) Is the defendant severally liable for any and all damages caused by implantation of Vitek TMJ implants into the proposed class members? If so, in what amount?

> [68] In a supporting affidavit, one of the plaintiff's solicitors stated that the list was not intended to be exhaustive but no additional common issues were identified by counsel at the hearing. It is noticeable that no issues were formulated in respect of the causes of action for breach of fiduciary duty and the alleged violation of section 7 of the Charter.
>
> [69] Subject to the comments that follow on issues (f), (g) and (h), each of the proposed common issues has the required element of commonality and a rational connection with the class definition, as amended above.
>
> [70] Insofar as proposed issue (f) would require the court to find that class members suffered harm from a breach of the defendant's duty and standard of care, there is an obvious question whether it could be answered on a class-wide basis at a trial of common issues. Where similar issues have been found to have commonality, they have, I believe, been understood to refer only to the elements of the tort that would constitute the existence and breach of a duty of care: see, for example, *Rumley v. British Columbia*, [2001] 205 D.L.R. (4th) 39 (S.C.C.). Interpreted in this manner, proposed common issue (f) would add nothing to the combined effect of issues (a), (b) and (c). If it is intended to raise the wider question that includes causation of harm, it could be accepted as an issue common to all class members only if it is alleged that the Vitek TMJ implants were

necessarily harmful - as distinct from hazardous - to anyone who receive them.

[71] Although the statement of claim stops short of making such an allegation, the plaintiff's fresh as amended reply to the statement of defence asserts that Health Canada had actual knowledge that TMJ implants cause real and substantial injury to all recipients. In a letter from Health Canada to the President of the Canadian Association of Oral and Maxillofacial Surgeons it was stated that "Vitek TMJ Interpositional Implants" had been recalled and that Vitek Inc. had gone out of business. The letter states that:

> The implants are made with Teflon Composite Coating that can break down under pressure, producing particles that can cause the body to reject them as foreign substances and may cause bone degeneration.

[72] It was said to be important that recipients of the implants should be re-examined every six months and X-rayed as "even patients without symptoms can experience bone degeneration".

[73] In September 1991, the United States Food and Drug Administration issued a Public Health Advisory on "Vitek Proplast Temporomandibular Joint Implants". Among other things it stated that one of the varieties of the Vitek TMJ implants

> ... has been demonstrated to wear significantly, fragment, and perforate. When this type of failure occurs a significant amount of wear particles are produced.... These particles ... have been reported to migrate to regional lymph nodes, as well as the adjacent tissue. This degeneration can result in chronic pain, permanent loss of functional masticatory function, and reduced range of motion of the mandible.

[74] The Advisory identified a variety of other clinical symptoms that patients could experience and strongly recommended that all recipients of the implants be notified and that they should have the devices removed as soon as possible.

[75] Notwithstanding the expert opinion evidence on which counsel for the Attorney General relied, I believe the question whether the implants cause harm to all recipients has the minimum evidential support required. To the extent that the Crown wishes to rely on the expert evidence and to dispute the plaintiff's position on the question, it raises an issue to be tried and is not one to be decided on this motion. The issue has commonality and, in order to indicate clearly that it is included in those to be tried,

paragraph (j) of the proposed common issues should refer to medical complications suffered by "all, or any," class members.

[76] It follows that, on the assumption, and the basis, that proposed common issue (f) is not limited to the question of a breach of a duty of care and extends to causation of harm to recipients, it has commonality and there is, in my opinion, sufficient evidential support to justify its inclusion in the issues to be addressed at the trial.

[77] In view of my finding that the class period would begin in May, 1983, common issues (g) and (h) are not required.

Section 5 (1)(d) – the preferable procedure

[78] The approach to be adopted in determining whether a class proceeding is the preferable procedure is conveniently encapsulated in the following extracts from the judgment of the Supreme Court of Canada in *Hollick* and that of this court in *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (S.C.J.)*:*

> The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. ... 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 the circumstances of the particular claims*, [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"...
>
> I think it clear, too, that the court cannot ignore the availability of avenues of redress apart from individual actions. As noted above, the preferability requirement was intended to capture 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": ... In my view, the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions. (*Hollick*, *per* McLachlin C.J., at paras 30-1)
>
> A class proceeding is the preferable procedure where it represents a fair, efficient and manageable method of determining common issues which arise from claims of multiple plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the

modification of behaviour of wrongdoers. (*Carom, per* Winkler J., at page 239)

> [79] Counsel for the Attorney General submitted that neither of the requirements referred to by Winkler J. is satisfied in this case. The thrust of their submissions on the second requirement was that none of the three goals to which the learned judge referred would be achieved in this case. Judicial economy would not be served because of the number and complexity of individual issues that would require separate trials - access to justice because of the size of the damages claim for each class member and the availability of contingency fees in individual proceedings - and behavioural modification because this could be achieved in individual proceedings.
>
> [80] Counsel did not suggest that the objectives of the legislation could be achieved to the same, or a greater, extent by procedures other than individual actions by class members. In my opinion, their submissions with respect to judicial economy ignore, or give insufficient weight to, the comparative nature of the inquiry and the extent to which a trial of the common issues would advance the proceeding. If the plaintiff is able to sustain her claim that Vitek TMJ implants are harmful to all recipients, an aggregate assessment of damages may be possible. Even if such an assessment is not made, section 6 provides that certification is not to be withheld simply on the ground that individual assessments of damages will be required.
>
> [81] If the questions of causation are found to raise individual issues so that findings of liability could not be made at the common issues trial, a resolution of the common issues I have accepted would achieve judicial economy to a significant extent when compared with a requirement that these issues be advanced, and relitigated, in each individual proceeding.
>
> [82] Nor do I accept the suggestion that access to justice will not be imposed because of the size of the damages claims that are likely to be made and the general availability of contingency fee arrangements. Such an arrangement exists for the purpose of this proceeding, but I am not prepared to assume, without evidence, that similar arrangements would be available for individual proceedings by a significant number of class members, or any of them. Nor do I accept that the CPA is now to be confined to cases where the amounts claimed in respect of class members are small. In particular, I do not believe any such conclusion is required, or supported, by the inference that the Chief Justice was prepared to draw in *Hollick* (at para 33) that, on the facts of that case, class members with substantial claims were likely to find it worthwhile to bring individual actions. The fact that, in the more than 20 years since the Vitek TMJ

implants began to be imported, and distributed, in Canada, some 30 or so individual actions by members of a class consisting of 200 or more persons have been commenced does not exclude the likelihood that the goal of access to justice will be achieved to a substantial extent if this proceeding is certified.

[83] I am also unable to accept the position of the Attorney General in respect of behavioural modification. To the extent that it is premised on the proposition that access to justice will not be served by certifying this proceeding, I have already rejected the premise. To the extent that it is suggested in counsel's factum that behavioural modification will not be served by successful class proceedings against government regulators, such as Health Canada, no authority was cited for that submission. I see no reason why it should be assumed that governmental bodies, their officials and employees are impervious to judicial findings, and damages awards, for negligent conduct relating to the manner in which they perform their public responsibilities and, in that respect, are to be distinguished from profit-making entities.

[84] A large part of the emphasis in the comprehensive submissions of Attorney General counsel was on the number and complexity of the individual issues relating to causation of harm and the assessment of damages if, as they submit, an aggregate assessment would not be possible. In this connection, they relied on what they submitted were inadequacies in the litigation plan presented on behalf of the plaintiff.

[85] Plaintiff's counsel did not dispute the expert evidence tendered by the Attorney General that related, among other things, to the numerous individual factors that could affect the issue of causation. In their submission, however, these should not be considered to overwhelm, or outweigh, the advantages to be achieved from a single trial of the common issues. I accept that submission. A determination of the common issues would resolve most of the contentious issues relating to the defendant's liability in favour of the plaintiff, or it would terminate the litigation. The manageability of the proceedings is always a concern that must be addressed but it has not been found to raise an insuperable obstacle in cases of pharmaceutical products and surgical implants of various kinds in which similar objections have been raised on behalf of defendants: see, for example, *Bendall v. McGhan Medical Corporation* (1993), 14 O.R. (3d) 735 (G.D.); *Wilson v. Anderson* (1999), 44 O.R. (3d) 673 (C.A.); *Wilson v. Servier* (2000), 50 O.R. (3d) 219 (S.C.J.); *Nantais et al v. Telectronics Proprietary (Canada) Ltd* (1995), 25 O.R. (3d) 331 (S.C.J.); *Andersen v. St Jude* (2003), 67 O.R. (3d) 136 (S.C.J.); and *Attis v. Canada (Minister of Health)*, [2007] O.J. No. 1744 (S.C.J.).

[86] Counsel for the Attorney General indicated that, in the event that common issues are decided in favour of the plaintiff, his client would wish to conduct individual discoveries and cross-examinations of each of the assumed 2600 class members and have the individual issues determined by the trial judge rather than by a referee as proposed by plaintiff's counsel in the litigation plan. It would also be wished to examine the class members, their physicians and surgeons, and representatives of the hospitals. It was said that the Crown would make third party claims against the surgeons and others. It could, in counsel's submission, take years or decades before the individual issues proceeded to trial.

[87] While the Crown like any other defendant in a class proceeding is entitled to assert, and rely upon, its procedural rights - and the court cannot assume that it will not do so - I am, of course, entitled to assume that, having been found to be in breach of private law duties of care owed to class members, the Attorney General would have respect for their rights, the potential validity of their claims and the integrity of the litigation process.

[88] I believe the issues of manageability raised by counsel for the Attorney General are overstated in a number of respects. As I have indicated, the evidence does not persuade me that there are anything like 2600 members of the class. The possibility of third party claims will be obviated if the references to the several liability of the Crown in the statement of claim are clarified in a manner referred to in the previous motion.

[89] Most fundamentally, the procedures for resolving individual issues are to be determined by the judge trying the common issues and I do not accept that a direction for a reference pursuant to section 25 (1) (b) of the CPA - as proposed by plaintiff's counsel - requires the consent of the defendant. Section 25 reads, in part, as follows:

25. When the Court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

(a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

> (c) with the consent of the parties, direct that the issues be determined in any other manner.

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

> (a) dispense with any procedural step that it considers unnecessary; and
>
> (b) authorise any special procedural steps, including steps relating to discovery, and any special rules, and any special rules relating to admission of evidence and means of proof, that it considers appropriate.

> [90] The section clearly governs procedures for determining any individual issues, other than those relating to an aggregate assessment of damages, and it is not confined to matters referred to in rule 54.02 (1) (b) or 54.02 (2). In *Webb v. K-Mart Canada Ltd* (1999), 45 O.R. (3d) 425 (S.C.J.), a reference was ordered despite the submission of defendant's counsel that other procedures would be more appropriate.
>
> [91] I do not accept the assumption implicit in the submissions made on behalf of the Attorney General that summary procedures involving a reference, or otherwise, could not be designed to resolve the questions of causation and that a full-scale trial before a judge in accordance with the Rules of Civil Procedure would be required to dispose of the claims of each class member. Nor do I accept that a defendant’s insistence at the certification stage that it will oppose any procedure but a trial is determinative.
>
> [92] When considering the application of section 5 (1) (e), I will refer to some of the other criticisms that counsel for the Attorney General levelled at the proposed litigation plan. My conclusion on the question of the preferable procedure is essentially the same as that of Winkler J. in *Attis*, at para 68, where he stated:

> ... a class proceeding appears to be the preferable procedure for resolving the claims. The litigation will be complex, dealing as it must with individual issues of causation prior to a final resolution

> of any person's claim. Nevertheless, there are access to justice, efficiency and management advantages to having the common issues heard and determined at a single trial. Since individual issues [may] have to be decided prior to any finding of liability for damages, there is no inherent unfairness to either the plaintiff nor the defendants as a result of a class proceeding. Finally, given the complexity of the litigation, and the number of potential claims, the provisions of the CPA provide the necessary superior case management tools, when compared to those available through either individual proceedings or an ad hoc case management regime under the normal *Rules of Civil Procedure.*

Section 5 (1) (e) - the representative plaintiff and the litigation plan

> [93] As I have indicated, there is evidence that Ms Taylor received a Vitek TMJ implant on April 22, 1988. Her alleged resulting injuries were appropriately described by her as catastrophic. They include severe and debilitating pain, sleep deprivation, muscular cramps and spasms, memory loss, oral and written communication difficulties, inability to engage in simple physical activities and household tasks, and exhaustion. She has been hospitalised on a number of occasions and has been unable to pursue her former professional occupation.
>
> [94] Notwithstanding Ms Taylor's membership in the putative class, counsel for the Attorney General submitted that she could not fairly and adequately represent the interests of the class and, in consequence, that she is disqualified from acting as a representative plaintiff. This submission was based principally on a limitations defence that has been pleaded by the Attorney General and on evidence that is said to have revealed conflicts between Ms Taylor's interests and those of other members of the class in respect of the common issues.
>
> [95] On the limitations question, counsel for the Attorney General relied on section 7 (1) of the *Public Authorities Protection Act*, R.S.O. 1990, c. P - 38 that provides a limitation period of six months from the time that a cause of action arose. Counsel accepted that the discoverability principle would apply, but submitted that, on the evidence, time would have started to run no later than February, 1996 which is almost four years before the commencement of this action.
>
> [96] Notwithstanding Ms Taylor's evidence that she was unaware of any cause of action against the Crown until she consulted counsel in May, 2002, it was submitted on behalf of the Attorney General that knowledge of the solicitors for the plaintiff in an earlier class action against the distributor of the implants in Canada must be imputed to her. Ms Taylor

was a member of the class in that proceeding - *Diane Bisignano v. La Corporation Instrumentarium Inc.* (Third Party Court File No. 22404) - and, after a settlement had been approved by this court on September 1, 1999, she received some funds.

[97] In my opinion, it is unnecessary to decide if, and when, knowledge of class counsel can be imputed to all class members for purposes of an application of the discoverability principle in other proceedings they may be involved in. In this case, the evidence of the knowledge of material facts relating to the negligence of Health Canada that the plaintiff's solicitor in the earlier case had acquired, or would with due diligence have discovered, falls short of that required by the discoverability principle. It amounts to no more than statements in correspondence between solicitors for the plaintiff and Health Canada in which it was said that the firm had "extensive documentation" which the writer believed to establish "several valid causes of action against Her Majesty" followed by a letter some months later in which he stated that his firm did not intend to pursue a class action. The second of these letters, but not the first, indicates that it was copied to Ms Taylor's solicitors in this action. I do not know whether they were acting for her at that time. There is no evidence of the nature and extent of the information the solicitors had acquired, their reason for deciding not to commence proceedings against the Crown or any information that was provided to the class in *Bisignano*. I have no information about the pleading or the issues in either that action or an action in the United States to which counsel relied.

[98] Moreover, even if I were to disregard the absence of any indication in the material filed that the Bisignano action was ever certified in this jurisdiction - arguably a prerequisite to the existence of a solicitor and client relationship between the plaintiff's solicitor and members of the class - the statement of claim in this case alleges continuing breaches of duty.

[99] Pursuant to section 7 (1) of the *Public Authorities Protection Act*, the six-month limitation period would not commence until the breaches ceased. On this ground, the Court of Appeal in *Logan* (paras 16 - 17) declined to find that the claim for negligence was untenable. The court held that, after a statement of defence had been filed, the limitations question could be one of the issues for trial, or possibly for another motion. In their factum, counsel for the Attorney General submitted that the position of Ms Taylor on these aspects of the limitations defence is no different than that of other class members. In consequence, they can, I believe, appropriately be added to the common issues I have accepted. While I do not accept the submission of plaintiff's counsel that the decision in *Logan* makes the question of limitations *res judicata*, I do not believe

the question can properly be decided on the material filed in this motion without leave after cross-examinations had been conducted.

[100] Counsel for the Attorney General submitted also that Ms Taylor should be rejected as a representative plaintiff because there was evidence that her implants contain a unique component and no evidence that it and other Vitek TMJ implants have any common characteristics. I do not accept the submission. The witness who referred to the conjunction of Proplast and another component as being unique in his experience, did not find that it would, or could, be significant in relation to the issues in the action. His evidence was that it was not "typical" - a concept that is not part of the criteria for certification in this jurisdiction. By itself, I do not consider this evidence to be sufficient to disqualify Ms Taylor as a representative of the class. This finding is without prejudice to any motion the defendants might bring - with supporting affidavit evidence - in the future for the examination or discovery of other class members.

[101] The submission that there is no evidence that the Vitek TMJ implants received by the plaintiff and the class members have common characteristics ignores the evidence that they have some materials in common. In determining at trial whether the implants may cause injury to the health of recipients, it may be necessary to consider whether that or some other factor – common, perhaps, to all TMJ implants - was the cause, but it is not a question to be decided on this motion.

[102] Finally, counsel for the Attorney General were, as I have indicated, heavily critical of the detailed litigation plan submitted on behalf of the plaintiff. I have already referred to, and rejected, the assumption that individual issues of causation can only be resolved at a trial before a judge, and that summary procedures will not be possible. A number of the other criticisms have more merit. The procedures, and the distribution of damages, must remain under the control of the trial judge. The provisions of Rule 54 relating to reports and their confirmation should be preserved.

[103] The objections with respect to the choice of particular individuals to discharge various functions with respect to the proposed references appear to be well-founded and should be considered. Although directions with respect to discovery, the admission of evidence and means of proof can be given by the trial judge, these matters should be addressed in the litigation plan if trials of the individual issues are not to be conducted under the ordinary procedure.

[104] I am in respectful agreement with the view expressed by Winkler J. in *Attis* (at para 69) that procedures for resolving individual claims following a settlement may not always be acceptable in a litigation

plan where the rights of a defendant to dispute the appropriateness of proposed procedures must be respected. It is, however, fundamentally the role of the trial judge, and not the motion judge, to resolve any such disputes. At this stage the question is whether the plaintiff's proposal is workable in its essentials. Perfect forsight cannot be expected and is not required. The process is under the supervision of the court and the proposals in any plan may be departed from as the litigation progresses.

[105] I have not seen the litigation plan that was criticised in *Attis*. Here, also, the plan must be amended to address the points I have mentioned but, like the learned judge, I do not consider the plan's deficiencies to reveal radical defects in the case for certification.

[106] For the above reasons, there will be an order certifying the proceedings subject to the amendments to be made to the litigation plan. Approval of these, the terms of the order, and any issues relating to the notice to be given to class members, can be dealt with at a case conference.

[107] Costs may be spoken to, or if counsel would prefer to make their submissions in writing, those of the plaintiffs should be made within 14 days of the release of these reasons. The defendant will have a further ten days in which to respond.

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CULLITY J.

Released: September 5, 2007

COURT FILE NO.: 99-CV-181819 CP
DATE: 20070905

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Kathryn Anne Taylor

Plaintiff

- and -

Her Majesty the Queen in Right of Canada as represented by The Minister of Health, the Attorney General of Canada

Defendant

- and -

University Health Network (formerly Toronto General Hospital), and Dr W. Dobrovolsky

Third Parties

REASONS FOR DECISION

CULLITY J.

Released: September 5, 2007