

COURT FILE NO.: 04-CV-45435 CP

DATE: 20080728

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Robert Tiboni, Benny Mignacca and Elaine Mignacca

Plaintiffs

)
)
) *Harvey T. Strosberg, Michael J. Peerless,*
) *Sabrina Lombardi and, Jacqueline A.*
) *Horvat*, for the Plaintiffs, as Respondents to
) the Motion to Stay the Proceeding and as
) Moving Parties in the Motion for
) Certification

- and -

Merck Frosst Canada Ltd., Merck Frosst Canada & Co. and Merck & Co. Inc.

Defendants

)
)
) *Clifford Cole, Mary Thomson, David*
) *Woodfield and Nicholas Kluge* for the
) Defendants, as Moving Parties in the
) Motion to Stay the Proceeding and as
) Respondents to the Motion for Certification

) HEARD: June 24, 25, 26 and 27, 2008

9

REASONS FOR DECISION

PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992

CULLITY J.

Background to the Litigation

[1] Vioxx is a pain reliever and anti-inflammatory drug that was developed and manufactured, and marketed and sold in Canada, by the defendants (collectively "Merck"). It was approved for sale by Health Canada in October, 1999 and, until its withdrawal by Merck on September 30, 2004, it was available in Canada as a prescription medicine for the treatment of osteoarthritis, rheumatoid arthritis, dysmenorrhoea and

- 2 -

acute pain. Within days of its withdrawal, class proceedings were commenced on behalf of users of the drug in most of the Canadian provinces that now have class proceedings legislation, and, subsequently, also in Prince Edward Island where no such legislation is in force.

[2] From the table provided to me by counsel for Merck, it appears that approximately 30 similar actions against Merck were commenced. At that time, Saskatchewan - as well as British Columbia, Alberta, and Newfoundland and Labrador ("opt-in jurisdictions") would include non-residents within a certified class only if they opted to participate in the proceeding. Ontario and Manitoba are "opt-out" jurisdictions that will include within a class resident and non-resident persons who do not opt out. New Brunswick became an opt-in jurisdiction when its legislation was enacted in 2006 and the statute subsequently enacted in Nova Scotia contains an opt-out regime. As of April 1, 2008, amendments to *The Class Actions Act*, SS. 2001, c.C.12.01 (the "Saskatchewan Act") converted Saskatchewan from an opt-in jurisdiction to an opt-out jurisdiction.

[3] Although the possibility of overlapping classes in cases in different Canadian jurisdictions existed previously, the potential problems that might arise became most obvious when this court, with its opt-out regime, began to certify national classes. Until recently, these problems have been largely avoided through the co-operation of plaintiffs' counsel in different jurisdictions, and by the willingness of the court in Ontario to exclude from a certified class residents of provinces in which class proceedings are pending.

[4] In this case, the problems have come to a head as, although substantial agreement with respect to the prosecution of most of the cases has been achieved among counsel (the "National Consortium") for the plaintiffs, agreement has not been reached with a Saskatchewan law firm (the "Merchant group ") that is acting for plaintiffs in cases commenced in most of the common law provinces.

[5] This proceeding was commenced the day after Vioxx was withdrawn from the market. The National Consortium is representing the plaintiffs. A similar proceeding was commenced in this court three days later by a number of plaintiffs who included Gerald Wuttunee and who were represented by the Merchant group. Mr Wuttunee is also a plaintiff in a substantially similar action against Merck and others in Saskatchewan that was commenced on October 1, 2004, and in which the plaintiffs are, again, represented there by the Merchant group. I will refer to these actions in Ontario and Saskatchewan as Wuttunee #1 and Wuttunee #2 respectively.

[6] Because of the failure of the National Consortium and the Merchant group to reach agreement, carriage motions were scheduled in Ontario and British Columbia among other provinces. Only the motion in Ontario has been decided. For reasons released on February 2, 2006, Winkler J., as he then was, decided that this action - then *sub. nom. Settrington et al v. Merck Frosst Canada Ltd. et al*, [2006] O.J. No. 376 (S.C.J.) - should be permitted to continue and ordered that Wuttunee #1 be stayed until further order of the court.

[7] The National Consortium did not represent plaintiffs in the Saskatchewan proceedings and no carriage motion was necessary there. Shortly before the carriage motion in this proceeding was heard, a motion to certify Wuttunee #2 was heard by Klebuc J., as he then was, in the Court of Queen's Bench of Saskatchewan. The hearing proceeded in stages and, ultimately on February 15, 2008, the learned judge released a decision certifying Wuttunee # 2 as a class action for residents who had consumed Vioxx, and non-residents on an opt-in basis.

[8] By this time, the hearing of the certification motion in this proceeding had been set down but was subsequently adjourned to permit Merck to conduct cross-examinations. It had been rescheduled for February 13 2008 but was postponed, again, because of a motion by Merck to disqualify plaintiffs' lead counsel and the National Consortium from participating in the proceeding. After the motion had been heard and decided, the certification motion was set down again to be heard on June 24 - 27, 2008.

[9] On May 2, 2008 after the amendments to the Saskatchewan Act had come into force, the plaintiffs in Wuttunee # 2 - represented by the Merchant group - applied to have the certification order amended so as to include both resident and non-resident class members on an opt-out basis. Ms Bonnie Tough - a member of the National Consortium - was permitted to appear and to oppose the application.

[10] On May 29, 2008, Klebuc C.J. released reasons approving a multi-jurisdictional opt-out class that would include all residents of Canada outside Quebec: [2008] S.J. No. 324 (Q.B.). The opt-out class for which certification is requested in this proceeding was then similarly described as:

all persons in Canada, including their estates, other than residents of Quebec, who were prescribed and who ingested Vioxx.

[11] Shortly thereafter I was advised by counsel for Merck that they wished to move to stay this proceeding pending an appeal, or appeals, of the decision to certify Wuttunee #2. I declined a request to defer the hearing of the motion to certify the proceeding, but gave leave to argue a motion to stay on June 24, 2008 - the first of the days originally set aside for the certification hearing.

[12] At the conclusion of the submissions of Merck's counsel on June 24, I adjourned the motion to stay to be brought back at the completion of the hearing of the certification motion if this was requested by Merck. In a brief endorsement attached to the motion record I indicated that, as counsel for the plaintiffs had suggested in their factum, the issues raised by the motion should most appropriately be dealt with after hearing the submissions on the question of certification - and, in particular, on the issues relating to class definition and the preferable procedure.

[13] At the hearing of the motion to certify the proceeding, counsel for the plaintiffs submitted that, apart from the exclusion of residents of Saskatchewan from the putative class, the developments in the Court of Queen's Bench should not be allowed to influence the issues relating to certification. Counsel for Merck were content to adopt the

submissions they had made on the motion for a stay. They did not attempt to integrate those submissions with their submissions on certification and, although they did not formally request that the motion to stay be brought back, it was my understanding that they wished to have it determined. In these circumstances - having heard counsel's submissions on each of the motions - I will deal with them in the order in which they were argued.

The motion for a stay

[14] Although motions such as that before Winkler J. are usually described as "carriage motions", the task of the court is not to choose between different counsel or groups of counsel according to their relative resources and expertise. It is to determine which of the competing actions is more, or most, likely to advance the interests of the class. This determination will, however, necessarily decide which counsel will represent the plaintiffs in the action. As Cumming J. stated in *Vitapharm Canada Ltd v. F. Hoffman-La Roche Ltd*, [2000] O. J. No. 4594 (S.C.J.):

The moving party brings what can be called a "carriage motion", seeking a resolution of the issue as to which action (s) shall proceed and hence, who is to be lead counsel. (para 2)

[15] At the same time, although there may be other relevant considerations, in deciding which of competing actions will best serve the interests of the putative class, the relative experience and resources of the plaintiffs' counsel can be an important factor and, in some cases, has tipped the balance.

[16] After hearing the submissions of counsel for the Wuttunee plaintiffs and those for the plaintiffs in this proceeding, Winkler J. held that it would be more advantageous for the class - including those members outside Ontario - to have this action proceed with its counsel group prosecuting that action. I am now asked to stay the action because the court in Saskatchewan has, implicitly, disagreed with that decision, and has seen no reason to defer to it.

[17] Section 6 (2) of the Saskatchewan Act provides as follows:

6 (2). If a multi-jurisdictional class action, or a proposed multi-jurisdictional class action, has been commenced elsewhere in Canada that involves the subject matter that is the same as or similar to that of the action being considered pursuant to this section, the court shall determine whether it would be preferable for some or all of the claims or common issues raised by those claims of the proposed class members to be resolved in that class action.

[18] Section 6 (3) sets out objectives and factors to be considered for the purposes of a determination under section 6 (2).

[19] Section 6.1 (1) deals with applications to certify multi-jurisdictional class actions in Saskatchewan and, in part, it reads as follows:

6.1 (1) the court may make any order it considers appropriate in an application to certify a multi-jurisdictional class action, including the following:

(a) an order certifying the action as a multi-jurisdictional class action if: ...

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

[20] It is my understanding that it was held in Wuttunee #2 that it would not be preferable for any of the claims in that action to be resolved in Ontario pursuant to section 6 (2) and that, pursuant to 6.1 (1) (a) (ii), Saskatchewan was the appropriate venue for the multi-jurisdictional class action. In paragraph 43 of his reasons the Chief Justice stated:

... I am of the opinion that one multi-jurisdictional class action for the common law provinces will promote judicial economy generally, and specifically in the instant case, without material prejudice to any class members beyond those prejudices inherent in a multi-jurisdictional class action. Not everyone can have a full trial near their place of residence.

[21] I do not believe I am called upon, or that it would be appropriate, to critique the decision of the learned Chief Justice and I do not intend to do so. I must accept that it is a correct application of the laws of Saskatchewan and that, as such, it merits the utmost respect. It does not, however, follow that I should now defer to the decision to the extent of ordering a stay of the proceeding that, in this court, was held be more advantageous to the class than the similar action brought by Mr Wuttunee and others with the same legal representation as in Saskatchewan. I am satisfied that, by themselves, principles of comity do not require such a result. Comity is, as Mr Strosberg submitted, a two-way street.

[22] In order to grant the stay requested by Merck, I would have to be persuaded that the existence, and certification, of the action in Saskatchewan are new developments that carry with them such advantages to the class that they should be considered to displace, or outweigh, the factors relied upon in the earlier decision of this court.

[23] In the carriage motion, Winkler J. found no significant differences in the scope of the competing actions, and he rejected arguments that the presence of additional

defendants in Wuttunee #1 provided a basis for preferring that proceeding. He declined to give weight to the fact that a certification motion had already been argued in Wuttunee #2 commenting:

While this means logically that the Merchant group has argued one more Vioxx specific certification motion than the Settingington counsel group at this stage, to give it greater consideration than that would be to ignore the vast wealth of experience of the Settingington counsel group in class-action litigation generally and certification proceedings in particular. The counsel group in the Settingington action is comprised of many pre-eminent class-action counsel from across Canada. They have extensive experience of every court level involving certification of class proceedings that is not matched by the Merchant group, regardless of experience in general litigation.

[24] In addition to the disparity in experience and resources, the learned judge referred to a failure by the Merchant group to disclose the existence of another lawsuit against Merck that, in his opinion, brought them into direct conflict with the interests of the putative class members in each of the competing actions - a conflict that, he stated, would in itself be a sufficient basis to preclude the Merchant group from acting as counsel for that class

[25] Winkler J. also expressed some concern that there was no evidence that the leading counsel of the Merchant group was entitled to practice in Ontario.

[26] In concluding, pursuant to section 6 (2), and 6.1 (1) of the Saskatchewan Act, that it was not preferable for the claims and the actions to be disposed of in Ontario, and that Saskatchewan was the appropriate venue, Klebuc C.J. referred only to the first of the considerations on which Winkler J. relied. He found, on the basis of evidence that is not part of the record on these motions, that, since the decision of this court, the Merchant Law Group had gained considerable experience and achieved considerable success in the prosecution of class actions and now has better resources and greater capability than it had when Wuttunee #1 was heard. The Chief Justice held that, under section 6 of the Saskatchewan Act, it was not necessary to "grade" counsel according to their respective abilities and that it was enough that the Merchant Law Group was capable of prosecuting a class action against Merck. The test is, therefore, different in Saskatchewan from that in Ontario. In determining preferability in Saskatchewan, relative degrees of competence and resources for pursuing a class action are not measured, while in this jurisdiction they may have considerable weight in determining the best interests of the class.

[27] Of the other factors relied upon by Winkler J., there is evidence that, in view of his disciplinary record in Saskatchewan, the lead counsel of the Merchant group - Mr E.F. Anthony Merchant Q.C. - would require the permission of the Law Society of Upper Canada to represent any of the class members in proceedings in this jurisdiction. There is,

however, no suggestion that he is not in good standing in Saskatchewan, or that other members of his firm could not represent members of the putative class in Ontario.

[28] Finally, no attempt was made by counsel for Merck to justify Mr Merchant's failure to disclose his firm's conflict of interest in the carriage motion. Nor was the conflict mentioned in the reasons of Klebuc C.J. I was advised that the proceedings from which the conflict arose have now been discontinued but there is no evidence to indicate whether this was sufficient to permit the firm to continue to represent class members.

[29] On their motion to stay, counsel for Merck did not rely heavily on the reasons of the learned Chief Justice for finding that, notwithstanding the decision in *Wuttunee #1*, the Saskatchewan action should be converted into a multi-jurisdictional class proceeding. Some mention was made of the fact that, unlike the position in this province, Saskatchewan has a no-costs regime and is therefore more favourable to impecunious plaintiffs. However, as counsel for the National Consortium pointed out in *Wuttunee #2*, that is hardly of any relevance when the plaintiffs in this proceeding - the only people potentially exposed to costs - have retained counsel and wish to continue with their action.

[30] Counsel for the plaintiffs in *Wuttunee #2*, however, also asked the court to accept that the costs regime in Ontario made plaintiffs and their counsel over-anxious to settle and, implicitly, to enter into improvident settlements to the advantage of defendants. This was a bald assertion made without any attempt to support it by evidence of particular cases, a comparison with settlements obtained in no-costs jurisdictions, the number of cases that proceed to trial in such jurisdictions, and the results obtained. In Ontario, settlements are, of course, encouraged and all settlements of class actions require the approval of the court. If there is any truth in the criticism that class members suffer from improvident settlements in Ontario, the ultimate responsibility for this lies with the court, and not with the provisions of the CPA governing costs. The argument that, in Ontario, the costs regime weighs the scales unfairly against plaintiffs, and the class, provides quite a contrast with the view increasingly implicit in the submissions of defendants' counsel that settlements by deep-pocket defendants are very commonly a form of legalised extortion.

[31] In *Wuttunee #2* much was made in argument by Mr Merchant of the relative efficiency and expedition of the administration of justice in Saskatchewan. Without any doubt, delays in civil proceedings are a serious cause of concern in this province. Whether the delays are largely a result of deficiencies in the court's process - rather than in lawyers' offices - is not so clear. Counsel have no difficulty in obtaining dates for certification motions, or preliminary motions for which leave has been granted, whenever they are ready to proceed. I am advised that the Court of Appeal has no backlog of cases and that delays there are more likely to arise before an appeal has been perfected by appellants' counsel.

[32] The existence of two levels of appeal in Ontario can cause delays that will not exist elsewhere and, to the extent that, in class proceedings, appeals to the Divisional Court are almost invariably followed by further appeals, there is no doubt a question

- 8 -

whether the intermediate appeal process might usefully be dispensed with for class actions. I note, however, that the history of this litigation in the courts of the other provinces hardly suggests that delays occur only in Ontario. The certification hearing in Wuttunee #2, for example, commenced in the Court of Queen's Bench of Saskatchewan in January 2006. Further argument was heard in November, 2007 and the reasons for certifying the proceedings on an opt-in basis for non-residents were released on February 15, 2008.

[33] None of the above suggested grounds for preferring the proceeding in Saskatchewan satisfies me that the plaintiffs in that action should be permitted to derail the decision of this court in the carriage motion to which Mr Wuttunee and their counsel, as well as Merck, were parties.

[34] I believe it is a fair comment that counsel for Merck did not make any great attempt to persuade me that the proceeding in Saskatchewan would be more advantageous for the class members than the continuation of this proceeding. The main thrust of their submissions was that it would be an abuse of process to permit multiple proceedings arising out of similar allegations of fact involving the same parties. In paragraph 65 of their factum they stated:

The jurisprudence identifies the following criteria or objectives that ought to be considered to stay an action on the basis of abuse of process:

- (a) there should be an end to litigation;
- (b) a party should not be "twice vexed by the same cause";
- (c) judicial resources are scarce;
- (d) litigants' resources are scarce;
- (e) consistency of results is vital to the legal system; and
- (f) finality of results is vital to the legal system.

[35] I do not believe anyone could take issue with that statement of objectives and plaintiffs' counsel did not do so.

[36] The difficulty for Merck on this motion is that none of their carefully developed submissions with respect to the above matters provides, or suggests, a reason why this action should be stayed and priority, in effect, given to the decision of the court in Saskatchewan over the earlier decision of this court. Of course a multiplicity of actions raising the same claims among the same parties is to be avoided. But why does it follow that the plaintiffs and their counsel in Wuttunee #2 should now be permitted to undermine the decision of Winkler J. by moving to expand the class in Wuttunee #2 at a time when, to their knowledge, the parties in this action had prepared for the certification

motion and the hearing was imminent? The only response I could discern in the submission of Merck's counsel was that this would be required by principles of comity. As I have indicated earlier in these reasons, I am not persuaded by the force of that submission in the circumstances of this case.

[37] I wish to emphasise that my decision to refuse to stay this proceeding will not reflect acceptance of a principle that would assign priority to jurisdictions in which claims are first made, or issues first determined. The practice of rushing to commence overlapping actions in as many jurisdictions as possible in order to claim turf and secure carriage for law firms - rather than to advance the interests of a putative class - gives ambulance-chasing a good name and, in my opinion, smacks of an abuse of process.

[38] In declining to grant the stay requested, I make no determination that either this proceeding or Wuttunee # 2 will be more advantageous to the putative class. My finding is grounded in the fact that a carriage motion was fully argued in, and decided by, this court almost two and one half years ago, and the action that was chosen to proceed has now progressed to the certification stage. In these circumstances, I am of the opinion that it should not now be stayed because of the recent conversion to a multi-jurisdictional class action of a substantially similar proceeding to that already stayed in this province.

[39] I am not convinced that the additional expense to be incurred by Merck is sufficient reason for granting a stay, and abdicating the jurisdiction of this court with respect to the national class - let alone its jurisdiction over the substantial number of members resident in Ontario. A simultaneous prosecution of class actions in British Columbia, Quebec and Ontario has been very common in the past.

[40] Merck is in agreement that there should be a separate proceeding in Quebec as well as in Saskatchewan and it is not clear to me that they would have any valid objection if actions were pursued in each of the provinces that have class proceedings legislation with the class limited in each case to residents of the particular province. I note also that, in its response to the motion for certification, Merck has taken the position that individual actions - with individual trials - by each of approximately 2000 members of the putative class would be preferable to a class action.

[41] While I am not convinced that the problems that will be created by the continuation of the two actions are insoluble, the result is, of course, unfortunate. If decisions of provincial courts on carriage motions are not to be respected throughout Canada, this merely underlines - and makes even more urgent - the need for an agreement or protocol among the superior courts that will provide for nationally-accepted carriage motions and determine the jurisdiction in which such motions will be heard. The recommendations of a committee of the Uniform Law Conference address the question of multi-jurisdictional class actions in different courts but, arguably, would give undue deference to the proceeding that is the first to be certified. To this extent they endorse what appears to be the prevailing view among counsel that the race is to the swift. I hope that we are able to do better than that.

[42] Although the stay requested by Merck was to extend only to the final disposition of appeals from the decision of Klebuc C.J., their counsel's submissions, if accepted, would have justified an order for a permanent stay. They indicated, moreover, that if the appeals were dismissed they would be seeking such an order. In these circumstances, I consider that it would be a false economy – and give rise to unnecessary delay - to put the question of a permanent stay on hold and to leave the status of this action in limbo pending further developments in Saskatchewan and, possibly, in the Supreme Court of Canada. As my reasons for dismissing the motion assume that the decision of the Saskatchewan Court of Queen's Bench is correct under the laws of that jurisdiction, they would apply equally to the motion for a permanent stay if that was now before the court.

[43] Finally, I should note that counsel referred me to a passage in the reasons of Klebuc C.J. in *Wuttunee #2* in which it is stated that Merck's counsel had opined that this court would, on grounds of comity, stay this proceeding pending any appeal of a decision to certify *Wuttunee #2* as a multi-jurisdictional class action. The transcript of the hearing suggests that the prophecy should more fairly be attributed to Mr Merchant (at pages 125-6) than to counsel for Merck.

Certification

[44] In their Fifth Amended Fresh Statement of Claim, the plaintiffs claim damages in negligence against the defendants and, in the alternative, an order for a disgorgement of revenues received from the sale of Vioxx in Canada. They moved to have the proceeding certified under the CPA with Robert Tiboni, Benny Mignacca and Elaine Mignacca appointed to represent all persons in Canada, and their dependants, who were prescribed and ingested Vioxx, other than residents of Quebec and Saskatchewan..

[45] The plaintiffs plead that Vioxx was a dangerously defective medication in that its use carried with it an increased risk of cardiovascular events such as heart attacks and strokes. They assert that the defendants, acting in concert, were negligent in the design, development, testing, manufacturing, distribution and sale of the drug in Canada. They allege, further, that the defendants knew or ought to have known of the cardiovascular risks associated with Vioxx some years before the drug was marketed in Canada and that they downplayed, or concealed, the relevant information from physicians, the public and regulatory authorities, and continued to market and distribute the drug as safe and effective as evidence of the risks continued to accumulate.

[46] The plaintiff's best estimate is that there were approximately 350,000 persons in Canada who ingested Vioxx between 1999 and 2004. In that period, 105 million prescriptions for the drug were written in the United States for approximately 20 million patients. Of the approximately 15.5 million prescriptions written in Canada, approximately 6.3 million were written in Quebec. I was informed by counsel that a significantly greater number were written in Ontario and that the number written in Saskatchewan was relatively very small.

[47] After the withdrawal of Vioxx, thousands of individual actions and more than 160 class actions were commenced in the United States. Certification as a nationwide class

action for personal injury was denied by a federal court in *Re Vioxx Product Liability Litigation*, 239 F.R.D. 450 (2006) ("*Re Vioxx (U.S.)*") and, subsequently, Merck entered into a settlement of the outstanding actions that would require it to establish a settlement fund of approximately \$ 4.85 billion to compensate persons who had suffered harm from ingesting Vioxx. Residents of Canada are not included in the settlement.

[48] Merck opposed the motion to certify the proceeding. In their counsel's submissions, none of the five requirements for certification in section 5 (1) of the CPA is satisfied. While they referred to the denial of certification in the United States Federal Court, most of the grounds for the decision were based either on requirements of the relevant legislation that have no counterparts in the CPA, or on problems arising from differences in substantive laws in the 51 states in which putative class members were prescribed, and ingested, Vioxx. To the extent, however, that the court held that the claims of such members were highly individualised and, on that ground, inappropriate for class-wide certification, the reasoning of the court may be considered to have some persuasive authority on what, I believe, is the issue of most difficulty in this case.

[49] Among the individual issues, those of causation occupied a large part of the submissions of defendants' counsel. Ms Thomson emphasised that this case does not concern medication, or devices, that are alleged to cause one "signature" type - or closely related types - of harm. She pointed, also, to the evidence that refers to the difficulty of determining whether Vioxx or other factors - such as a patient's medical history and lifestyle - provided a causal nexus with the injury or harm allegedly suffered.

[50] In the six volumes that constitute the defendants' responding motion record, an enormous amount of information and medical and scientific literature is provided. Among other things, this material deals with the development of Vioxx; how it achieves its intended effects; its advantages over earlier medications for relieving pain; the risks of adverse side-effects that accompany its use; the history of Merck's testing and studies relating to the drug; and the factors that led Merck to withdraw the drug from the market. The evidence deals with the causes of heart attacks and strokes and other cardiovascular events. The regulatory system in Canada and in the United States is described in some detail. One expert rheumatologist provided his opinion that it would never be possible to say with certainty that an individual's heart attack was caused by Vioxx.

[51] All of this evidence is helpful for the purpose of explaining the factors that will bear on the issues at a trial and, to that extent, it provides context for the issues that arise on certification. Although defendants' counsel took care, and exercised some skill, in relating the evidence to the issues on certification, inevitably its relevance to the merits of the plaintiff's claims - irrelevant at this stage - was not entirely absent from their submissions. In particular, I note that, in determining whether there are common issues for the purpose of certification, the inquiry is not the same as that into the existence of genuine issues for trial as required on motions for summary judgment. Such motions test the merits of a plaintiff's case.

[52] It was established in *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158 that only a minimum factual basis needs to be established by evidence for the existence of common

issues. Once provided, the question whether the defendants could obtain summary judgment by providing additional conflicting evidence that demonstrates that there are no genuine issues for trial will not arise and evidence directed at the question is irrelevant and inadmissible. If this were not correct, every opposed certification motion would be likely to involve, in effect, the same test of the merits as on a motion for summary judgment, and the evidential burden on plaintiffs would be increased enormously.

[53] It follows that, when, as here, the defendants' deliver affidavit evidence that is relevant only to the merits of the plaintiffs' claims – as, for example, expert opinions that Merck's scientific study and testing of Vioxx was "rigorous", that Merck did everything a responsible company could be expected to do, and that, given the benefits of the drug, the risks involved in its use are tolerable – the plaintiffs have no obligation to challenge the accuracy of such opinions on this motion. Statements by defendants' counsel that such evidence is "undisputed" may be literally correct for the present purposes. They are also of no significance.

[54] The plaintiffs produced the evidence of two expert witnesses one of whom - Dr Michael Rieder of the Division of Clinical Pharmacology at the University of Western Ontario - opined that a body of experimental work, clinical trials and expert opinions of investigators suggests that there is an increased risk for thrombosis and adverse cardiovascular events when Vioxx is used by patients with a predisposition for thrombosis. The other expert witness - Dr David Massel, also of the University of Western Ontario - expressed an opinion that it was clear from the scientific literature that there is a very serious issue regarding the safety of the use of Vioxx and the extent to which this seriously increases the risk of adverse cardiovascular events.

[55] The CPA requires each of the requirements in sections 5 (1) (a) through (e) to be satisfied. I will consider them in turn.

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

[56] The requirement in section 5 (1) (a) is to be considered on the basis of the pleading alone. The question is whether material facts that constitute a cause of action have been pleaded. Evidence is inadmissible and it must be assumed that - unless manifestly incapable of proof - the allegations of fact in the statement of claim will be proven at trial. Moreover, unless it is plain and obvious that the existence of a cause of action would be rejected on the basis of the allegations of fact, the requirement in section 5 (1) (a) will be found to be satisfied.

[57] In my judgment, the constituent elements of the tort of negligence have been pleaded sufficiently. Those of reasonable foreseeability and proximity that are required for a duty of care can readily be inferred from the allegations of fact. Similarly, facts that would constitute breaches of a duty of care have been particularised and consequential harm consisting of physical injury and financial losses have been pleaded.

[58] A short answer to the criticisms of Merck's counsel that not all persons in the proposed class will have suffered harm and thereby have a "plausible claim in negligence" is that this proposition depends entirely on evidence and evidence is

[62] Contrary to the submissions of defendants' counsel, statements in cases such as *Serhan* (at para 46) that issues relating to waiver of tort require a full evidential record

inadmissible for the purposes of section 5 (1) (a). More fundamentally, I do not believe section 5 (1) (a) requires disclosure of a cause of action by each member of a putative class. The requirement is that the pleading asserts causes of action by the plaintiffs against the defendants. It is only if, and when, this threshold question has been resolved in favour of the plaintiffs that the requirements relating to a class are to be determined pursuant to sections 5 (1) (b) and 5 (1) (c). For these purposes, evidence is admissible and some evidence is required. The objections raised by Merck's counsel in the context of section 5 (1) (a) were more properly raised by them subsequently for the purposes of the requirements of sections 5 (1) (b) and (c).

[59] For essentially the same reason, Merck's objection that the pleading of the disgorgement remedy based on waiver of tort is deficient in that it ignores the possibility that the relevant laws of other provinces and territories may not be the same as those of Ontario is misconceived. Robert Tiboni, and Benny and Elaine Mignacca, are residents of Ontario.

[60] The other objections to the plea of waiver of tort amount, in essence, to an invitation to depart from the approach taken in the decisions of this court in *Peter v. Medtronic Inc.* (2007), O.J. No. 4828 (S.C.J.), *Lefrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (S.C.J.), *Serhan Estate v. Johnson & Johnson et al* (2006) 85 O.R. (3d) 665 (S.C.J.) and *Heward v. Eli Lilly & Co.* (2006), 39 C.P.C. (6th) 153 (S.C.J.), and of the Divisional Court in the last two of those cases. While I accept, of course, that decisions on materially different facts cannot be determinative, I do not believe the pleading in this case is materially different from that in *Heward*, for example.

[61] The important element in the reasoning in the cases just mentioned was the uncertainty in the present state of the law relating to the disgorgement remedy, together with the decisions of the Court of Appeal that, for the purposes of motions to strike under rule 21.01 (1) (b), impose restrictions on the approach to be taken by a motions judge in such circumstances. I see no justification for departing from that reasoning on the basis of the pleading in this case. I note, in particular, that I do not accept the submissions of Merck's counsel that the absence of fraud or wrongdoing sufficient to give rise to a disgorgement remedy distinguishes this case from *Serhan*. In the statement of claim it is alleged that, in order to maximise its profits, Merck engaged in a strategy of misinformation and made representations with respects to the safety of the of the drug that it knew or ought to have known were false. It is alleged that, despite having received clear evidence of the cardiovascular risks associated with Vioxx, Merck did not include any warning of them in the labels to be attached to the products and withheld from Health Canada information relating to the risks. It is pleaded further that Merck issued a press release in April 2000 which denied the existence of the risks and, thereafter, continued to downplay and conceal them. This conduct which is alleged to have been sufficiently deliberate, callous and intentionally in disregard of the safety of consumers is relied on for a claim for punitive damages. I do not believe it is out of the question that it might support a claim for disgorgement.

[62] Contrary to the submissions of defendants' counsel, statements in cases such as *Serhan* (at para 46) that issues relating to waiver of tort require a full evidential record

- 14 -

refer to the record at a trial, and not the record on this procedural motion, and they do not affect the principle that the requirement under section 5 (1) (a) is to be considered on the basis of the pleading alone.

[63] I note, also, that the required causal connection between Merck's tortious conduct and its receipt of revenues has been sufficiently pleaded: *cf.*, *Heward v. Eli Lilly and Company*, [2008] O.J. No. 2610 (Div. Ct.) .

Section 5 (1) (b): an identifiable class

[64] The primary class, as proposed by the plaintiffs is defined as:

all persons in Canada, including their estates, other than residents of Quebec and Saskatchewan, who were prescribed and ingested Vioxx.

[65] In addition there is a family class defined as:

the spouses (including common-law spouses and same-sex spouses), children, grandchildren, parents, grandparents, brothers and/or sisters of [members of the primary class].

[66] I understand the exclusion of residents of Saskatchewan from the primary class to reflect the previous practice of this court to defer to the jurisdiction of another Canadian court over its own residents. In the submission of plaintiffs' counsel this is all that principles of comity require in the circumstances of this case.

[67] The definition of the primary class satisfies the three tests applied by McLachlin C.J. in *Hollick*, at para 17:

The first question, therefore, is whether there is an identifiable class. In my view, there is. The appellant has defined the class by reference to objective criteria: a person is a member of the class if he or she [was resident in Canada outside Quebec and Saskatchewan and ingested Vioxx] within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited). There is, therefore, an identifiable class within the meaning of s. 5 (1) (b).

[68] These tests must be applied subject to a further requirement referred to by the learned Chief Justice at paras 20 - 1:

The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there must

- 15 -

be some rational relationship between the class and the common issues. ...

The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad - that is, the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of a common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.

[69] This passage is commonly relied on by defendants' counsel for the proposition that a class must not be "over-inclusive" - a proposition that, if taken in isolation, disregards the specific meaning the Chief Justice gave to the notion of a class that is "unnecessarily broad".

[70] Referring to the evidence of an expert who had sworn an affidavit filed on behalf of the plaintiffs, Ms Thomson submitted that the class as proposed was unacceptably over-inclusive. The expert, Dr David Massel, had included in his affidavit a statement that, of the estimated 350,000 members of the class, those who suffered adverse cardiovascular problems from taking Vioxx would be in "the thousands". In cross-examination, he agreed with Miss Thomson that his best estimate would be "somewhere in the area of 2000 people".

[71] A similar criticism of the composition of a putative class was made and rejected in *Heward* (paras 66-69) and in *Attis v. Canada (Minister of Health)*, [2007] O. J. No. 1744 (S.C.J.), at para 52. The class in *Attis* was defined in terms of persons residing in Canada, outside British Columbia, who received breast implants manufactured and sold by a particular group of corporations. Winkler J. stated:

Canada contends that the class definition is "unnecessarily broad" and that there is no rational "connection between a class member who did not suffer any injury or damages and negligence by [Canada]". I do not agree. The basic claim of the plaintiffs is that the breast implants, or medical devices, at issue were unsafe for their intended use and, therefore, should not have been permitted to be sold or used in Canada. It logically follows that there was a rational connection among all individuals who were implanted with the devices and the claim made. The fact that some of the individual class members may not have suffered harm, or not yet suffered harm, does not alter the fact that they were exposed to an allegedly defective device. While any particular class member's claim may prove to be unsuccessful, one purpose of class action

litigation is to achieve judicial economy by resolving all potential claims.

[72] Winkler J. then quoted the passage in paragraph 21 of *Hollick* that I have set out above and commented:

In consideration of an allegation that a given product is unsafe for use, it is difficult to accept the proposition that all users would not have some interest in the outcome of the litigation. Conversely, it is equally difficult to accept a proposition that the defendants subject to the allegation would not want to ensure that all potential claims are resolved and all potential claimants bound by the results, including those claims that may fail.

[73] In an important discussion, the learned judge then referred to the growing practice of limiting class definitions to those members otherwise included who claim to have suffered harm. He expressed the view that the use of such a "claims limiter" would entirely meet the objection that the class was unnecessarily broad.

[74] A similar addition to the class definition in this case could, of course, be made, but I would prefer to leave it as it is for the same reasons provided by Winkler J. in respect of the class in *Attis*.

[75] As, in *Ragoonanan v. Imperial Tobacco Canada Ltd.*, [2005] O.J. No. 4697 (S.C.J.), I expressed some criticism of the technique of using "claims limiters", I will mention that I remain skeptical about its principled, or practical, utility and effectiveness. My scepticism is not based simply on the fact that a class criterion that leaves a person who has not opted out of a class free to decide whether he or she is a class member might not be considered to be "objective" in any of the myriad senses in which that word is used. I am also in respectful agreement with Winkler J. that, by itself, the use of the device would not transform the class description here into what the learned judge described as an impermissible "merits-based" definition. However, in my opinion, a claims limiter achieves nothing other than to create an illusion that a class has been narrowed in a significant respect so that it can no longer be described as "over-inclusive".

[76] In *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (G.D.) at para 10, the three purposes of a class definition were described as: (a) to identify the persons who have a potential claim for relief against the defendants; (b) to define the parameters of the law suit so as to identify those persons who are bound by its result; and (c) to describe who is entitled to notice pursuant to the Act.

[77] Whether or not a class accepted in this case is limited to those who claim to have suffered harm, only those who make such a claim will have any possibility of obtaining relief for Merck's negligence, and all persons who ingested Vioxx will be "bound" in the sense that they will be unable to relitigate an unfavourable decision on the common issues and obtain damages for negligence. As far as notice is concerned, the use of a

“claims limiter” would not affect the necessity to give notice of certification to all persons who ingested the drug. In consequence, the use of a “claims limiter” does not, in my opinion, narrow the class significantly. It is arguably a verbal device that achieves nothing except to meet an argument that appears to be based on a misreading of *Hollick*.

[78] For essentially the same reasons as those provided by Winkler J. in *Attis*, I cannot accept the submission of Merck's counsel that the plaintiffs have the burden of establishing by evidence that all members of the class are likely to have causes of action against the defendants, if this means that all will probably have suffered harm. In any class action involving claims in tort for personal injury, or economic loss, it is possible that the claims of some class members will be unsuccessful. This is virtually ordained by the authorities that preclude merits-based class definitions. As the Chief Justice recognised in *Hollick*, a minimum evidential basis must be provided for the existence of class members' claims that raise common issues, but this falls far short of the proposition that the plaintiffs must establish on a balance of probabilities that all class members have claims that are likely to succeed, or that they have suffered harm. In *Hollick*, the court found that the necessary minimum evidentiary burden had been discharged when the plaintiff provided evidence that complaints of harm had been received from 950 of the approximately 30,000 members of the putative class.

[79] In my judgment, the reasoning of Winkler J. in *Attis*, at para 52, is equally applicable to the primary class definition proposed by the plaintiffs and it follows that the definition is satisfactory.

[80] Independently of the above comments, I note that the plaintiffs' claims for pecuniary damages, and for a disgorgement of revenues or profits, are made on behalf of all members of the class as defined.

[81] In previous versions of the statement of claim the definition of the family class was limited to dependants ("as defined by section 61 of the Family Law Act R.S.O. 1990, c. F - 3") of members of the primary class. The revised definition is, I believe, intended to include, as well, persons with derivative claims under the Fatal Accidents Acts of Manitoba, Alberta, New Brunswick, the North-West Territories, Prince Edward Island and the Yukon and the Fatal Injuries Act of Nova Scotia as these statutes are pleaded, and relied upon, in paragraph 88 of the statement of claim. I will refer to them together with the Family Law Act as "Dependants Statutes". If the above is correct, paragraph 85 of the statement of claim requires amendment as it continues to state simply that Elaine Mignacca - the proposed representative of the family class - and the other members of the family class plead and rely on section 61 of the Family Law Act.

[82] In its present form, the definition of the family class does not track the language of - or include all relationships referred to in - the Dependants Statutes. The relationships referred to in the statutes are, moreover, not defined uniformly. To have the required rational connection with the claims asserted on behalf of the family class, the definition requires further amendment so that it will include all - and only - persons who by reason of their relationship to a member of the primary class, or otherwise, are entitled to make

claims under any of the Dependants Statutes in respect of the death or personal injury of such a member.

Section 5 (1) (c): common issues

[83] The plaintiffs propose the following common issues:

1. Was Vioxx defective or unfit for the purpose for which it was intended and designed, developed, fabricated, manufactured, sold, imported, distributed, marketed or otherwise placed into the stream of commerce in Canada by one or more of the defendants? If so, how?
2. Did any of the defendants owe a duty of care to the class members? If so, what was the standard of care? Did any of the defendants breach the standard of care? Were any of the defendants negligent? If so, who, when and why?
3. Did any of the defendants have a duty to warn the class members of the risks of harm from Vioxx? If so, did any of them fail to warn in a timely manner? If so, who, when and how?
4. Is each of the defendants responsible in law for the acts or omissions of either one or both of the other defendants in respect of the sale and marketing of Vioxx in Canada?
5. Can the class elect to "waive the tort" and require the defendants to account for the gross revenue, or alternatively, the net income from the sale of Vioxx in Canada? Are the defendants constructive trustees over the gross revenue or the net income? What amount is held in a constructive trust and by whom?
6. Is one or more of the defendants a constructive trustee(s) for all or any of the class Members of all or any part of the proceeds of the sales of Vioxx? If so, in what amount and for whom are such proceeds held?
7. Are class members entitled to recover the medical costs incurred in the screening, diagnosis and treatment of medical conditions caused by taking Vioxx?
8. Are class members entitled to recover as damages an amount equal to the purchase price of Vioxx, or part of the purchase price of Vioxx? If so, why and in what amount?

- 19 -

9. Can damages of class members be determined, in whole or in part, on an aggregate basis? If so, who should pay what amount, to whom and why?

10. Should one or more of the defendants pay punitive damages? Should punitive damages be assessed in the aggregate? If so, in what amount and how should punitive damages be distributed?

11. Should the defendants, or any of them pay prejudgment and post-judgment interest, at what annual interest rate, and should the interest be compound interest?

12. Should the defendants, or any of them, pay the cost of administering and distributing any monetary judgment and/or the cost of determining eligibility and/or the individual issues? If so, who should pay what cost, why, in what amount and to what extent?

[84] Of these issues, numbers 1 through 5 are the most important for the purposes of this motion. Issues similar to them have been accepted in a number of Canadian cases, including *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (B.C.C.A.); *Andersen v. St Jude Medical Inc.*, (2003), 67 O.R. (3d) 136 (S.C.J.); *Medtronic*; *Serhan*; and *Heward*. This case must be decided on its own facts but, as in those cases, the issues have the required attributes of commonality once it is kept in mind that the trial judge has power to adopt the nuanced approach affirmed by the Supreme Court of Canada in *Rumley*, at paras 31-2, and to create subclasses when this is necessary.

[85] Issue 1 raises a question that, in *Harrington*, was described as "the first step in every products liability case alleging negligent design, manufacture, or marketing" and which, in *Re Vioxx (U.S.)*, was described as "general causation" and, as such, accepted as a common issue.

[86] Issue 1 was criticised by Merck's counsel on a number of grounds that I do not find persuasive. It is not, for example, a valid criticism that the court at trial might find that Vioxx was fit for some purposes and not for others. Such a finding would provide a context in which issues 2 and 3 would have to be addressed, but would not exclude the possibility that some or all of them should be answered in the affirmative.

[87] Nor am I prepared to accept the proposition that, because of the evidence that Vioxx would be harmful only for certain class members in certain circumstances, it follows that common issue 1 could only be answered on an individual basis. The suggestion that it raises questions of such medical uncertainty that they could not be decided judicially on a balance of probabilities - with the onus of proof on the plaintiffs - is likewise unconvincing.

[88] The objections raised by Merck's counsel to issues 2 and 3 also blur the line between proposed common issues and individual issues. The former place the focus on the knowledge and conduct of Merck without regard to the knowledge of particular patients and their physicians. Merck accepts that the information it is to provide to physicians, and the manner in which this is to be done, is prescribed by regulation. If it has failed to provide such information in the prescribed manner, it may well be found to breach a duty, and a standard of care, whether or not a patient or a physician has obtained information from other sources, and whether the physician has passed on all appropriate information and warnings to the patient.

[89] Once again, in the context of issues 2 and 3, the criticisms of Merck's counsel did not, in my opinion, successfully bridge the logical gap between differences in the standard of care that may be found to have existed at various times between 1999 and the withdrawal of the drug in 2004, and counsel's conclusion that a nuanced approach could not be adopted and that, in consequence, the issues could only be determined on an individual basis.

[90] Proposed common issue 4 has the required commonality and was not criticised by counsel for Merck.

[91] Issue 5 dealing with waiver of tort is acceptable subject to a few changes to cover the possibility that a disgorgement remedy might be granted with respect to only part of the revenue, or net income, for the benefit of one or more subclasses. In this connection, I note the comments of Cumming J. in the Divisional Court in *Heward*, at paragraphs 33 and 40:

33. The *CPA* provides a flexible a mechanism for a common issues judge to modify the claim based on the evidence before him or her. In *Medtronic*, Hoy J. noted on this particular issue, as we do here that "it is open to the common issues judge to create a "waiver of tort" subclass, or even subclasses, crafted with regard to his or her findings as to the boundaries of the doctrine of waiver of tort and remedy of disgorgement, including the requisite causal link." It is also open to the common issues judge to decertify common issues if he or she sees fit.

40. Restitutionary relief may be available in class proceedings even in the case where only a portion of a class are victims of the wrongful conduct. See *Markson v. M.B.N.A. Canada Bank*, 2007 ONCA 344 (CanLII). Subsections 24 (2) and (3) of the *CPA* afford the court a flexible mechanism for receiving and resolving individual claims in order to give effect to an aggregate damages award. This mechanism could be utilised in dealing with individual claims where an aggregate award is based upon restitution rather than damages.

[92] Subclasses could also be created if the defendants are successful in establishing at trial that there are material differences in the law relating to the disgorgement remedy in different Canadian jurisdictions.

[93] Plaintiff's counsel accepted that issue 6 is redundant if the changes I have mentioned are made to issue 5.

[94] The possibility of an aggregate assessment of damages is to be determined by the judge at a common issues trial and, strictly, it need not be included in an order for certification. While, for the reasons given by Merck's counsel, it may seem unlikely that general compensatory damages for physical injury could be assessed on an aggregate basis, the position may be different in respect of claims for disgorgement and pecuniary losses. In these circumstances, I see no compelling reason why issue 9 should not be included among those to be tried.

[95] The remaining issues are, as Merck's counsel recognised, largely ancillary to, and dependent on, the resolution of issues 1 - 3 and 5. They - including the issue relating to punitive damages - are, in my judgment, satisfactory subject to a few minor changes. Such changes, and others to issues 1, 2 and 5, will be made in an appendix to these reasons.

[96] In the course of their submissions on the proposed common issues, Merck's counsel referred to the question whether a resolution of particular issues would significantly advance the proceeding. This question which, among other things, involves a consideration of the number, difficulty and importance of the individual issues that would remain to be decided must, in my opinion, be determined on the basis of the common issues taken together, and not separately. Unlike the position in the United States, the question is not whether common issues predominate over the individual issues. The test is not the same. It requires a consideration of the extent to which the resolution of the common issues will advance the three objectives of the CPA - access to justice; judicial economy; and behavioural modification.

[97] As the goals of the legislation are the dominant consideration, the enquiry tends to merge with the requirement in section 5 (1) (d) that a class proceeding will be the preferable procedure, and that - implicit in section 5 (1) (e) - that it be "workable".

Sections 5 (1) (d): the preferable procedure

[98] In *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.), the Court of Appeal summarised the principles that govern the requirement in section 5 (1) (d) as follows:

(1). The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;

(2). "Preferable" is to be construed broadly and is meant to capture the two ideas of whether a class proceeding would be a fair,

- 22 -

efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,

(3). The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

[99] The summary was adopted later in *Cassano v. The Toronto-Dominion Bank*, [2007] O.J. No. 4406 (C.A.) where Winkler C.J.O. stated:

The third principle requires that the preferability determination be made by looking at the common issues in relation to the claim as a whole. The claim as a whole includes any individual issues as well as the common issues. The scheme of the CPA, which is a procedural statute, provides for the resolution of common issues and any individual issues that remain.

[100] In my judgment, a decision on the common issues, and particularly issues 1, 2, 3 and 5, will substantially advance the litigation towards a resolution of the claims of class members. Individual issues relating to causation, harm and damages will remain if common issues 1, 2 and 3 are resolved in favour of the plaintiffs. The common issues trial, however, will determine the crucial and complex questions relating to Merck's conduct with respect to the design, testing, marketing and distribution of Vioxx on which the plaintiffs must succeed if liability in negligence, or liability to account for waiver of tort, is to be established. I do not accept the submission of Merck's counsel that these questions are merely "tangential to the crux of this litigation". They are, as I have indicated, contentious, complex and crucial questions in relation of the claims in negligence, and they may lead to a finding of liability to account for revenues or profits.

[101] A common issues trial is likely to be lengthy and this, and the arguments of Merck's counsel on the complexity of the issues, underline the significant extent to which access to justice and judicial economy would be achieved by certification. This is, in my opinion, reinforced when, viewed in the light of these objectives, the procedure under the CPA is contrasted with individual actions: the alternative that I was asked to accept as an equally appropriate - and even preferable - procedure. As outlined in their factum, and supported at the hearing, this would accomplish nothing substantial that could not be achieved under the CPA by case management of pre-trial procedures as proposed in the plaintiffs' litigation plan. It would, however, require the common issues to be relitigated in respect of each claimant.

[102] Notably absent from the submissions of Merck's counsel was any recognition that Merck's success on what they described as "abstract" common issues would almost certainly terminate the litigation in their favour.

- 23 -

[103] It was central to the submission of Merck's counsel that the significance of the individual issues relating to the claims for negligence would far outweigh - or overwhelm - that reasonably attributable to a resolution of the common issues. As well as attempting to downplay the importance of the latter, counsel relied on the reasoning of Judge Fallon in *Re Vioxx (U.S.)* and his finding that the claims were too highly individualised to be appropriate for class-wide adjudication. The individual factors to which he referred were:

- (a) the nature of the alleged injury of a class member;
- (b) Merck's knowledge of the risks when the drug was prescribed for each class member;
- (c) what information about the risks Merck had provided to physicians at that time;
- (d) the knowledge the physician had acquired from other sources;
- (e) whether the physician would still have prescribed Vioxx if stronger warnings had been given;
- (f) the medical history and prior lifestyle of the class member; and
- (g) whether the class member followed directions or exceeded the recommended dosage.

[104] As I indicated earlier in these reasons, the individualised nature of the claims was only one of the grounds on which Judge Fallon relied in withholding certification. The others have no counterparts in the CPA and, in particular, the requirement that the common issues will predominate over the individual issues contrasts with the approach to be applied in this court.

[105] I recognise that the question whether - and the extent to which - particular adverse events suffered by class members were caused by Vioxx, or by other factors, may be difficult, but that, in itself, does not make them unsuitable for determination by one of the methods set out in section 25 (1) of the CPA. Nor, of course, is there any reason to suppose that each of the factors will be relevant, or of any great difficulty, in every case.

[106] Very similar arguments to those of Merck's counsel on the significance of the individual issues were made and rejected in *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.), *Heward*, and the implantation cases such as *Andersen, LeFrancois and Medtronic*. Leave to appeal from decisions on the preferable procedure was refused in *Wilson* and *Andersen* and an appeal was dismissed in *Heward*.

[107] In *Heward*, I referred to the reasons of Cumming J. in *Wilson* and stated that, despite differences in the facts, I considered them to be equally applicable for the purposes of the motion then before me. I am of the same opinion on the facts of this case.

- 24 -

As in *Heward*, I am satisfied that the extensive powers and discretion conferred on the court by section 25 of the CPA should be adequate to permit the trial judge to fashion manageable procedures for resolving the individual issues in accordance with the civil standard of proof - although possibly not in accordance with the higher standards of medical certainty that the defendants' experts might wish to apply to the issues of causation. Whether mini-trials by judges, referees or other procedures agreed on among the parties are employed, there is no reason to assume that the adversarial and procedural rights of the defendants will not be protected.

[108] The *in terrorem* forecast of Merck's counsel that certification would be followed by thousands of spurious claims that would "choke out" a few *possibly* viable claims appears to ignore the maligned costs regime in this jurisdiction.

[109] Before leaving the question of the preferable procedure, I note again that the complexities of the medical, scientific and other factual questions - as emphasised by Merck's counsel - and the likely lengths of individual trials of the common issues, would necessarily be a deterrent to the prosecution of individual actions - the alternative that Merck's counsel propounded. Access to justice would, in consequence, be enhanced by certification. As Cumming J. stated in *Wilson* (at para 124):

Access to justice is extended to persons who may have been injured by a defective product. There would be very significant cost to any claimant pursuing an individual claim given the tremendous complexities of evidence and issues, the extensive scientific and medical evidence and discoveries and the protracted nature of the litigation: ... but for a class proceeding, the defendants (if responsible) would in all probability be effectively isolated from the individual claims.

[110] As in other cases of products liability, a successful prosecution of this case as a class proceeding would act as a warning, and as a deterrent, to manufacturers and vendors tempted to subordinate their obligations to consumers - and their duties of care - to their profit-making objectives. To that extent, the continuation of the proceeding as a class action will accord with the objective of behavioural modification.

Subsection 5 (1) (e): a representative plaintiff with a workable litigation plan

[111] Benny Mignacca and Robert Tiboni are the proposed representative plaintiffs for the primary class consisting of persons who ingested Vioxx. Benny was prescribed the drug in July 2000 and suffered a cerebral artery stroke in November, 2000. He continues to suffer from aphasia to some extent as a result. He has sworn an affidavit in which he attests to his responsibilities as a representative plaintiff, his intention to perform them, the absence of any conflict between his interests and those of other class members, and his unwillingness to accept the financial cost of pursuing an individual proceeding.

[112] As a result of his cross-examination by Mr Thomson, the defendants submit that Benny Mignacca is not a suitable representative plaintiff. His answers in cross examination seemed at times to be unresponsive to the questions he was asked - a fact

- 25 -

that his counsel attributed to the continuing effects of his stroke and his consequent inability to find the right words to express his thoughts. He stated that all his information about the proceeding, and about class actions in general, had been provided to him by his lawyers, that they had prepared his affidavit and that he had reviewed it with them before he signed it. His answers in cross-examination were most unresponsive when he was asked for his understanding of his responsibilities as a representative plaintiff. Although the question was repeated more than once, the answers suggest that he may have thought he was being asked about his responsibilities at a trial and the evidence he could give of the health consequences suffered by other persons who had ingested Vioxx.

[113] It is not required of a representative plaintiff to have knowledge of class proceedings other than that acquired from his lawyers. Mr Mignacca's affidavit sets out his understanding of his responsibilities in a satisfactory manner. I am not persuaded from my review of the transcript as a whole that he lacks the capacity, the competence or desire, to act as a representative plaintiff, or that his answers to Ms Thomson reflect a lack of understanding of his responsibilities rather than a misunderstanding of her questions - as well as, perhaps, a reflection of the speech problems to which his counsel referred.

[114] It was also submitted that Mr Mignacca was unsuitable as a representative plaintiff because of a conflict between his interests and those of class members who are alleged to have suffered adverse health consequences other than a stroke. If such a conflict existed, it would not so much disqualify him as require that additional representatives be appointed for such other class members. At this stage, the possibility that conflicts that may affect decisions with respect to the prosecution of the plaintiffs' case will arise from the different types of harm is quite speculative. If and when they do arise, an order certifying the proceeding can be amended to designate subclasses with separate representation.

[115] The other proposed representative plaintiff for the primary class, Robert Tiboni, did not swear an affidavit and, although he was cross-examined by Ms Thomson on his medical history, the evidence in the record is insufficient to discharge the burden of establishing that he would be a suitable representative plaintiff.

[116] No objection was taken to the proposed appointment of Elaine Mignacca as the representative of the family class.

[117] The revised litigation plan filed at the commencement of the hearing adequately meets criticisms that the defendants had, in their factum, directed at the original plan. The principal remaining point of contention relates to the extent of Merck's ability to participate in proposed hearings to resolve individual issues relating to injury, causation and damages. On my interpretation of the plan, I do not believe this is a fair criticism. Merck's right to participate in references is expressly included and I believe it is implicit that the defendants' procedural rights to defend claims would be protected. In other respects, the plan is as comprehensive as can reasonably be required at this stage of the proceeding and, in my judgment, it is a "workable" plan within the meaning of section 5 (1) (e).

CONCLUSION

[118] For the above reasons, there will be an order certifying the proceeding with Benny and Elaine Mignacca as representative plaintiffs, if the few amendments to the statement of claim are made as I have indicated. Whether or not counsel can agree on the terms of the order, I wish to review it at a case conference before it is entered. Any submissions on costs can be made at that time.

[119] In its present much-amended form, the statement of claim is, in places, difficult to follow. A further fresh as amended statement of claim is to be filed within 30 days incorporating all present amendments - and those to be made in accordance with these reasons - without underlining.


CULLITY J.

Released: July 28, 2008

Appendix Common issues

1. Was Vioxx defective or unfit for the purpose for which it was intended and designed, developed, fabricated, manufactured, sold, imported, distributed, marketed or otherwise placed into the stream of commerce in Canada by one or more of the defendants? If so, how and to what extent?
2. Did any of the defendants owe a duty of care to the class members? If so, what was the standard of care? Did any of the defendants breach the standard of care? If so, who, when and why?
3. Did any of the defendants have a duty to warn the class members of the risks of harm from Vioxx? if so, did any of them fail to warn in a timely manner? If so, who and when?
4. Is each of the defendants responsible in law for the acts or omissions of either one or both of the other defendants in respect of the sale and marketing of Vioxx in Canada?
5. Can the class, or any subclasses, elect to "waive the tort" and require the defendants to account for all or part of the gross revenue, or alternatively, of the net income from the sale of Vioxx

in Canada? Are such amounts held in a constructive trust for the members of the class or any subclasses, and, if so, by whom?

6. Are class members entitled to recover the medical costs incurred in the screening, diagnosis and treatment of medical conditions caused by taking Vioxx?

7. Are class members entitled to recover as damages an amount equal to the purchase price of Vioxx, or part of a purchase price of Vioxx? If so, why and in what amount?

8. Can damages of class members be determined, in whole or in part, on an aggregate basis? If so, who should pay what amount, to whom and why?

9. Should one or more of the defendants pay punitive damages? Should punitive damages be assessed in the aggregate? If so, in what amount and how should punitive damages be distributed?

10. Should the defendants, or any of them pay prejudgment and post-judgment interest, at what annual interest rate, and should the interest be compound interest?

11. Should the defendants, or any of them, pay the cost of administering and distributing any monetary judgment and/or the cost of determining eligibility and/or the individual issues? If so, who should pay what cost, why, in what amount and to what extent?

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Robert Tiboni, Benny Mignacca and Elaine
Mignacca

Plaintiffs

- and -

Merck Frosst Canada Ltd., Merck Frosst Canada &
Co. and Merck & Co. Inc.

Defendants

REASONS FOR DECISION

CULLITY J.

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