NOVA SCOTIA COURT OF APPEAL

Citation: *Wright Medical Technology Canada Ltd. v. Taylor*, 2015 NSCA 68

Date: 20150707
Docket: CA 429260
Registry: Halifax

Between:

Wright Medical Technology Canada Ltd.,
Wright Medical Technology, Inc. and
Wright Medical Group, Inc.

Appellants

v.

Ken Taylor

Respondent

Judges:	Farrar, Saunders and Bryson, JJ.A.
Appeal Heard:	January 29, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Farrar and Bryson, JJ.A. concurring.
Counsel:	Scott C. Norton, Q.C. and Scott R. Campbell for the appellants Raymond F. Wagner, Q.C., Michael Dull and Madeleine Carter, for the respondent

Reasons for judgment:

[1] This is a products liability case which concerns an allegedly defective hip transplant system. In June 2007 Mr. Kenneth Taylor had his left hip replaced on account of osteoarthritis. His attending surgeon used a Wright Profemur Hip Implant System (WPHIS) conceived and produced by the appellants. Two years later the device failed. Mr. Taylor sued, alleging negligence in the design and manufacture of the implant system. He applied to have his action certified as a class proceeding under the **Class Proceedings Act**, S.N.S. 2007, c. 28 (the "**Act**").

[2] The appellants opposed the certification application, primarily on the basis that Mr. Taylor had not met the evidentiary burden upon him to satisfy the necessary statutory criteria for certification.

[3] The matter came before Nova Scotia Supreme Court Justice Michael J. Wood in Chambers on August 15, 2013.

[4] In a written decision dated March 7, 2014 (now reported 2014 NSSC 89) Wood, J. certified the proceeding. He was satisfied that Mr. Taylor had met the burden of showing some basis in fact for each of the certification criteria described in s. 7 of the **Act**.

[5] On appeal to this Court the appellants say the motions judge erred in two respects: first, in concluding that the claims of the proposed class members raised a common issue; and second, in determining that a class proceeding would be preferable for the fair and efficient resolution of the dispute. They ask that the order certifying this action as a class proceeding be set aside, with costs throughout.

[6] On consent of the parties, this Court granted leave to appeal on August 14, 2014.

[7] For the reasons that follow I would dismiss the appeal.

Background

[8] The appellants are engaged in the design, manufacture and marketing of a hip prosthesis product known as the Wright Profemur Hip Implant System for

which Health Canada granted licensing approval in 2001. For convenience I will refer to the WPHIS as the "device".

[9] The appellants say that 5496 Canadian patients have had the device surgically implanted. The respondent, Mr. Ken Taylor, is one of those patients. In 2007 he had the device implanted after a total left hip arthroplasty necessitated by joint deterioration due to osteoarthritis.

[10] Approximately two years later the device failed when its neck component fractured. Mr. Taylor underwent revision surgery in September 2009.

[11] In 2011 Mr. Taylor sued the appellants claiming special, general, aggravated, punitive and exemplary damages, together with interest and costs. In the most recent iteration of his pleadings, he says the appellants are responsible for the failure of the device on the basis of:

> (a) Negligent design, development and testing;
>
> (b) Negligent manufacturing;
>
> (c) Negligent distribution, marketing and sale; and
>
> (d) Breach of the Nova Scotia **Sale of Goods Act**, S.N.S. 1989, c. 408, in particular, the implied warranties of merchantable quality and fitness for intended purpose found in that legislation.

[12] He sought certification of his claim as a class proceeding on behalf of other Canadians who had experienced a similar fracture at the neck of the device.

[13] At the certification hearing before Justice Wood, both parties filed affidavit evidence. Mr. Taylor, the proposed representative plaintiff, filed lengthy expert opinions; one prepared by David S. Komm, a mechanical engineer and consultant, a second written by Kerry Knapp, a biomechanist, and a third prepared by Dr. David J. Zukor, an orthopaedic surgeon. The appellants relied upon the affidavits filed by their Senior Manager, Debbie Daurer, and Byron A. Deorosan, Ph.D., a biomechanical engineer. Mr. Taylor's factum provides a helpful and fair summary of the evidence, which I will repeat here:

> 1. ***Affidavits of Dr. Kerry Knapp and Mr. David Komm (biomechanist and mechanical engineer, respectively):***
>
> • They examined a sample of the failed system provided to them by the Respondent.

- They conclude the failure mode of the sample to have been caused by "actual fatigue of the material", with the result that "insufficient material remains to carry the given load, and the component fails abruptly in a final brittle failure."
- They find that "the failure mode of (the sample provided) is identical to those documented and reported by others".
- They opine that the identical failure mode of failed systems of sample provided and those documented and reported by others is due to defects in "original manufacturing or defects in component designs and subsequent assembly".
- They state that an actual determination of the cause of the "identical" failure mode will require destructive testing.
- They conclude based on an analysis of the sample provided by the Respondent and a review of available literature that it is well within the balance of probabilities that the Appellants' product is subject to premature failures due to either manufacturing or design issues.

2. ***Affidavit of Dr. David Zukor (orthopaedic surgeon):***

- Where revision is eventually required, he states that it is usually due to a "wear-out of the bearing surface".
- He states that it's normally reasonable to expect a minimum of twenty years of good function from a hip replacement.

3. Cross-examination transcript of Dr. David Zukor (orthopaedic surgeon):

- He states that the fracture of a hip prosthesis is "an incredibly rare occurrence...it's something that's an extremely rare phenomenon".

4. Affidavit of Debbie Daurer (manager for one of the Appellants):

- She evidences that the Appellants' own evidence indicates that over 60% of all revisions in Canada were because the neck of the Wright Profemur Hip Implant System fractured. The Canadian revision rate for the Device was stated to be 0.98%. Total neck sales were 5,496, therefore 53.86 of these required revisions (0.98% of 5,496). The Canadian total fractures of necks (which necessitate revisions) was 33. 33 revisions due to fractures of necks represent 61% of the total 53.86 revisions.

5. Affidavit of Dr. Bryon A. Deorosan (biomechanical engineer):

- He rebuts the analysis of Dr. Knapp and Mr. Komm , summarizing that they "do not provide enough evidence to conclude that the modular neck is associated with premature failure."

- He reaches an opposite conclusion: “that the Profemur literature and modular neck fracture rates do not indicate that the modular necks are subject to “premature neck failure.””
- He distinguishes “failures” from “fractures” and states that hip prosthesis in general can fail for a number of reasons related to the characteristics of an individual patient.
- He does not state individual circumstances can cause fractures. He does not state whether any failures in the Appellants’ product in particular are caused by individual variables.

[14] The appellants held discovery of Dr. Zukor and the transcript of that testimony was filed at the hearing. They chose not to cross-examine Dr. Knapp and Mr. Komm. They did not object to the admissibility of any of the respondent’s evidence at certification. Instead they challenged the weight to be given to that evidence.

[15] Having chosen to commence his action as a proposed class proceeding, Mr. Taylor was required to have it certified before it could continue on an aggregate basis. As such he had to satisfy the five criteria set out in s. 7(1) of the **Act**. Those criteria may be summarized as requiring the following:

> (a) a cause of action, as pleaded;
>
> (b) an identifiable class of more than one person;
>
> (c) an issue for adjudication that is common amongst the class members;
>
> (d) demonstrating that it is preferable to adjudicate these common issues on an aggregate basis; and
>
> (e) a proper and adequate representative plaintiff.

[16] The appellants agreed that Mr. Taylor was an appropriate representative plaintiff. The principal matters in dispute at the hearing were whether the claims of the proposed class members raised common issues for adjudication, and whether allowing the claim to go forward as a class proceeding would be the preferred route to take for the fair and efficient resolution of the dispute.

[17] Several statutory provisions are relevant to the proper disposition of the principal matters in dispute on appeal. Section 2(e) of the **Act** says:

> "common issues" means
>
> (i) common but not necessarily identical issues of fact, or
>
> (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[18] Section 7(1) obliges the court to certify a proceeding as a class proceeding where the statutory criteria noted therein are satisfied. It says:

> **Certification by the court**
>
> 7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> (a) the pleadings disclose or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by a representative party;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and
>
> (e) there is a representative party who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
>
> (iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.
>
> [Underlining mine]

[19] The **Act** goes on to provide guidance as to the factors the court must consider when deciding whether to allow the claim to proceed on a class basis. Section 7(2) says:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider
>
> (a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;

> (b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;
>
> (c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and
>
> (f) any other matter the court considers relevant.

[20] As the **Act** makes clear, seeking certification does not involve a consideration of the merits. Section 8(2) says:

> (2) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.

[21] Also relevant in the circumstances of this case is s. 10 which provides, in part:

> **Certain matters not bar to certification**
>
> 10 The court shall not refuse to certify a proceeding as a class proceeding by reason only that
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) ...
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable; ...

[22] Where circumstances change after certification, the court may order that a claim be decertified. Section 13 provides:

> **Where conditions for certification not satisfied after certification**
>
> 13 (1) Without limiting subsection 11(4), where at any time after a certification order is made under this Part it appears to the court that the conditions referred to in Section 7 or subsection 9(1) are not satisfied, the court may amend the certification order, decertify the proceeding as a class proceeding or make any other order it considers appropriate.

> (2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties and may make any order referred to in Section 12 in relation to each of those proceedings.

[23] Finally, concerning appeals, s. 39 says:

> **Appeals**
>
> 39 (3) With leave of a judge of the Nova Scotia Court of Appeal, any party may appeal to that court from
>
> (a) a certification order or an order refusing to certify a proceeding as a class proceeding; or
>
> (b) ...

[24] At the application hearing, while the appellants conceded that Mr. Taylor's Statement of Claim, as amended, disclosed a cause of action in negligence, they disputed the adequacy of the pleadings with respect to the **Sale of Goods Act**. Specifically, they said the proposed claim did not establish the necessary relationship as between buyer and seller and did not identify the person or body from whom Mr. Taylor (presumably his surgeons) had purchased the device. Wood, J. rejected this initial, technical objection on the part of the appellants. He said:

> [31] The defendants' objection with respect to this pleading is that it does not establish the relationship of buyer and seller, and does not set out particulars about who the plaintiff purchased the device from. In other words, there needs to be a purchase agreement between the plaintiff and the defendants in order to trigger the statutory warranties found in the legislation.
>
> [32] In my view, it is not necessary that the plaintiff set out the particulars of the alleged purchase agreement in the statement of claim in order to satisfy the requirement that the pleading disclose a cause of action. Paragraph 40 recites that the plaintiff and other class members purchased the device pursuant to agreements as defined in the legislation. In my view, this is sufficient to satisfy this criterion.

[25] However, the motions judge went on to accept the appellants' more substantive argument which attacked Mr. Taylor's failure to present an evidentiary basis which would support a finding of commonality under the **Sale of Goods Act**. Wood, J. reasoned:

> [52] The final proposed common issue relates to the Nova Scotia *Sale of Goods Act*. There was no evidence indicating how Mr. Taylor or any members of the proposed class came to acquire the WPHIS and, in particular, whether there was a purchase agreement with any of the defendants. In addition, with a national class many of the members will not be entitled to rely on the Nova Scotia *Sale of Goods Act*. I am not satisfied that the plaintiff has met the minimal evidentiary burden of showing a common issue with respect to whether there was a breach of the *Sale of Goods Act* and I would not certify that as a common issue.
>
> [53] At the certification motion hearing, there was a suggestion that perhaps a subclass could be created for Nova Scotia residents who might be entitled to raise this legislation. There was no evidence indicating how many people this might include and whether they acquired their device on common terms. I see no basis for certifying a subclass on the sole issue of the application of the Nova Scotia *Sale of Goods Act*.

[26] The motions judge then turned his attention to the other principal elements upon which the respondent sought to ground his application for certification as a class proceeding. After careful review he was satisfied that the claim should go ahead as a class proceeding. In particular, he said there were three questions which ought to be adjudicated at a common issues trial:

> (a) Was the device defective?
>
> (b) Did any of the defendants breach a duty of care owed to any of the class members and, if so, when and how?
>
> (c) Does the defendants' conduct warrant an award for punitive damages, and if so, to whom should they be paid?

[27] On appeal, the appellants limit their challenge of Justice Wood's findings to two fronts: common issues, and preferable procedure. Accordingly, we do not need to address his analysis with respect to cause of action, identifiable class, or the proposed representative plaintiff.

[28] The appellants say the motions judge erred by "failing to engage in" the rebuttal evidence they presented. Had he done so, he would have been driven to conclude that their evidence had "trumped" the plaintiff's assertions, thereby effectively emasculating his reasons for certification. At the hearing and again on appeal the appellants insist that the proposed representative plaintiff failed to present some basis in fact in support of the alleged common issues. They attack "the methodology and foundation that underlie the opinions and conclusions" expressed by Mr. Taylor's experts. While acknowledging that Mr. Taylor's

"evidentiary burden is modest at this stage of analysis" the appellants insist that "when viewed in light of the entirety of evidence on this application, the value and credibility of the Plaintiffs' evidence ... has been immunized." Accordingly, they say the motions judge ought to have determined that there was no basis in fact to find any commonality on any of these questions. They argue that the only fair way to assess the merits of these disparate claims is to present them as separate, individual trials.

Issues

[29] I see two issues on appeal which I would frame as follows:

(i) Did the motions judge err in concluding that the claims of the proposed class members raised common issues for adjudication?

(ii) Did the motions judge err in concluding that a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute?

Standard of Review

[30] The governing standard of appellate review for the determination of the questions of common issues, and preferable procedure under the **Act**, was described by this Court in **Canada (Attorney General) v. MacQueen**, 2013 NSCA 143 at ¶111, leave to appeal refused [2014] S.C.C.A. 51:

> [111] Whether a common issue exists and whether a class action is the preferable procedure for the fair and efficient resolution of the dispute are questions of mixed fact and law. These questions are subject to a standard of review of palpable and overriding error unless the certification judge made some extricable error in principle with respect to the characterization of the standard or its application in which case it is an error of law reviewable on the standard of correctness (*Ring v. Canada (Attorney General)*, ¶6-7).

[31] The unique nature of certification proceedings attracts special considerations on appeal. Courts across the country have recognized that a decision to grant a certification order is entitled to substantial deference. While of course no deference arises in cases where the motions judge has erred in principle, considerable deference is given to conclusions based on the weighing and balancing of factors

that arise in certification proceedings. Justice Cromwell makes this point in **AIC Limited v. Fischer**, 2013 SCC 69 at ¶65:

> [65] I recognize that a decision by a certification judge is entitled to substantial deference: see e.g. *Pearson*, at para. 43; *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 33. Specifically, "[t]he decision as to preferable procedure is . . . entitled to special deference because it involves weighing and balancing a number of factors": Pearson, at para. 43. However, I conclude that deference does not protect the decision against review for errors in principle which are directly relevant to the conclusion reached such as, in my view, occurred here: see e.g. *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 23, leave to appeal refused, [2008] 1 S.C.R. xiv; *Markson*, at para. 33; *Cloud*, at para. 39.

[32] For the reasons that follow I am not persuaded that Wood, J. made any error in principle in concluding that the common issues proposed by Mr. Taylor satisfied the requisite degree of commonality, or that a class action would be the preferable procedure to adopt in this case. Neither do I see any palpable and overriding error in Justice Wood's determination of the facts or in his weighing and balancing of the various factors that arose on the evidence before him.

[33] I will now consider each of the principal issues on appeal.

Analysis

(i) <u>Did the motions judge err in concluding that the claims of the proposed class members raised common issues for adjudication</u>?

[34] On this issue the appellants raise two main arguments. First, they say the motions judge ignored or failed to give sufficient weight to the expert opinion evidence they presented to defeat the certification application. Second, and tied to their first argument, they suggest the judge did not understand or apply the requisite standard of proof when he considered the evidence presented by both sides at the hearing. I am not persuaded by either argument.

[35] As I said, the appellants' first complaint is that the motions judge "failed to conduct a proper analysis of the common issues" and failed to adequately "engage" in their rebuttal evidence which they say – had he done so – ought to have driven him to the conclusion that the respondent had not demonstrated a substantial common ingredient to each of the class members' claims. To support their argument, the appellants place great emphasis upon this Court's criticism of the

approach taken by the motions judge in **MacQueen, supra**. For example, in that case this Court said:

> [112] As will be explained, in our view, the certification judge erred in principle in failing to perform the proper analysis in determining whether the common issues met the criteria to be certified.
>
> ...
>
> [119] The appellants argue that the certification judge erred in failing to do a proper analysis to determine whether the common issues are really common as between the respondents. We agree.
>
> ...
>
> [122] With respect, whether there is an "arguable case with respect to the defendants' potential liability" is not the legal test for determining common issues. Further, although the certification judge said the determination of the common issues will advance the dispute as a whole and avoid duplicate findings of fact and determination of legal issues, he did not analyze the common issues to show how those determinations would advance the claim as a whole.
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> ...
>
> [123] The legal principles relating to common issues were summarized in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at ¶81 ...
>
> [124] In our view, the certification judge erred by certifying in his Order all the common issues proposed by the respondents without considering the necessary legal principles to determine whether each of the common issues shared a substantial common ingredient that would advance the litigation. ...
>
> [Underlining mine]

[36] I respectfully disagree. **MacQueen** was a very different case. Because the facts, surrounding circumstances, evidence, pleadings and causes of action in that case are all so readily distinguishable from the much narrower issues challenged in this appeal, it would be misguided to mechanically transpose this Court's reasoning in **MacQueen**, to the features of this case. The failings which led to a setting aside of the certification order in **MacQueen** had to do with errors arising from the motions judge's failure to consider and apply correct legal principles, misstating the legal test for determining common issues, and failing to conduct a proper analysis of commonality. Respectfully, those shortcomings are not evident in this case.

[37] When considering appeals from certification orders it is often helpful to start by placing this powerful statutory tool in context. The unique role and importance

of class actions were described by the Supreme Court of Canada in **Western Canadian Shopping Centres Inc. v. Dutton**, 2001 SCC 46 and in **Hollick v. Toronto (City)**, 2001 SCC 68. For simplicity I will merely repeat and adopt this Court's reference to those two cases in **MacQueen** at ¶ 29-30 (again with the same emphasis bolded in **MacQueen**, and citations omitted):

> [29] A useful history and overview of class action proceedings and their predecessors is provided by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at ¶19 to 29, where class actions are described as having:
>
> > 26 … an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.
> >
> > 27 ***Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis.*** The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): ...
> >
> > ***28 Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually.*** Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: ...
> >
> > 29 ***Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public.*** Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit

> would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: ...
>
> [Emphasis added, citations omitted]

[30] The foregoing advantages of class proceedings were reiterated by the Supreme Court in *Hollick v. Toronto (City)*, 2001 SCC 68 at ¶15:

> The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. … In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
>
> [16] It is particularly important to keep this principle in mind at the certification stage. … ***The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action***: … [Emphasis added]

[38] In their written and oral submissions the appellants appear to concede (albeit rather grudgingly) that Mr. Wright had a very low evidentiary threshold to meet in order to satisfy the statutory criteria for certification. Respectfully, this is settled law. In **Hollick, supra**, Chief Justice McLachlin said:

> 25 I agree that the representative of the asserted class must show some basis in fact to support the certification order. ... that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, ... the class representative will have to establish an evidentiary basis for certification: ... my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act ...

[39] Recognizing as they must, this binding statement of principle, the appellants attempt to bolster their criticism of the judge's "flawed" and "inadequate" analysis by suggesting that recent academic commentary has altered or tempered the "some basis in fact" threshold, and that the rebuttal evidence they tendered in this case serves to "trump" and nullify the evidence presented by the respondent such that whatever "basis in fact" Mr. Taylor may have presented has now been effectively eliminated, thus defeating any legitimate claim to commonality.

[40] With respect, I do not accept the appellants' view of the law. The very same suggestion that there ought to be a revisiting of the standard of proof in class action certification proceedings was thoroughly canvassed and rejected by the

Supreme Court of Canada in **Pro-Sys Consultants Ltd. v. Microsoft Corporation**, 2013 SCC 57. There, Rothstein, J., writing for a unanimous 9-member Court said:

> (a) Standard of Proof
>
> [99] The starting point in determining the standard of proof to be applied to the remaining certification requirements is the standard articulated in this Court's seminal decision in *Hollick*. In that case, McLachlin C.J. succinctly set out the standard: ". . . the class representative must show some basis in fact for each of the certification requirements set out in . . . the Act, other than the requirement that the pleadings disclose a cause of action" (para. 25 (emphasis added)). She noted, however, that "the certification stage is decidedly not meant to be a test of the merits of the action" (para. 16). Rather, this stage is concerned with form and with whether the action can properly proceed as a class action (see *Hollick*, at para. 16; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 ("*Infineon*"), at para. 65; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 50).
>
> [100] The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin C.J. did, however, note in *Hollick* that evidence has a role to play in the certification process. She observed that "the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification" (para. 25).
>
> [101] Microsoft, while accepting the "some basis in fact" standard, argues that "in order for the Plaintiffs to meet the standard of proof, the evidence must establish that the proposed class action raises common issues and is the preferable procedure *on a balance of probabilities*" (R.F., at para. 41 (emphasis in original)). Microsoft relies on the academic writings of Justice Cullity of the Ontario Superior Court of Justice. Cullity J. expressed the view that "[t]o the extent that some basis in fact reflects a concern that certification motions are procedural and should not be concerned with the merits of the claims asserted, there seems no justification for applying the lesser standard to essential preconditions for certification that will not be within the jurisdiction of the court at trial" ("Certification in Class Proceedings — The Curious Requirement of 'Some Basis in Fact'" (2011), 51 *Can. Bus. L.J.* 407, at p. 422). In other words, Cullity J. suggests that because certification requirements are procedural, they will not be revisited at a trial of the common issues. As such, there is no reason to assess them on a standard lower than the traditional civil standard of "balance of probabilities". Microsoft further submits that this Court should endorse the American approach of making factual determinations at the certification stage on a preponderance of the evidence and should require certification judges to weigh

the evidence so as to resolve all factual or legal disputes at certification, even if those disputes overlap with the merits (see R.F., at para. 42, citing *In re: Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2008), at p. 307, and R.F., at para. 43).

[102] I cannot agree with Microsoft's submissions on this issue. Had McLachlin C.J. intended that the standard of proof to meet the certification requirements was a "balance of probabilities", that is what she would have stated. There is nothing obscure here. The *Hollick* standard has never been judicially interpreted to require evidence on a balance of probabilities. Further, Microsoft's reliance on U.S. law is novel and departs from the *Hollick* standard. The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" (*Cloud*, at para. 50; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (S.C.J.), at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.)). The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding" (*Infineon*, at para. 65).

[103] Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.

[104] In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.

[105] Finally, I would note that Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is the

> power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).
>
> [Underlining mine]

[41] From this one can see that the Supreme Court of Canada's articulation of the test is clear. Neither the goal posts nor the playing field has changed. The Court rejected any suggestion that the questions of common issues, or preferable procedure, require a standard of proof based on a balance of probabilities. On the contrary, the Court reiterates its "some basis in fact" standard, further explaining that the application of that standard:

- did not "require that the court resolve conflicting facts and evidence at the certification stage" recognizing that courts are "ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessment of evidentiary weight"
- was not an exercise that "involves an assessment of the merits of the claim"
- was never "intended to be a pronouncement on the viability or strength of the action", and
- did not "give rise to a determination of the merits of the proceeding".

[42] During oral argument in this Court the appellants asked, rhetorically, what is the point of engaging experts and presenting rebuttal evidence if the evidentiary bar facing any potential representative plaintiff is so low? In my respectful view the answer to that question is found in Justice Rothstein's reasons in **Pro-Sys** together with the other leading authorities to which he refers.

[43] One starts with the recognition that the burden is upon the applicant who seeks to have the proceeding certified on a class basis. There is no burden upon the proposed defendant to prove the contrary. Justice Rothstein reminds us in ¶99 of his reasons that the standard of proof is that which Chief Justice McLachlin established in the "seminal decision in *Hollick*" that being "... the class representative must show *some basis in fact* for each of the certification requirements set out in .... the Act..." [italics in original]. We are reminded that "[e]ach case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merit stage ..." (at ¶103-04).

[44] Justice Rothstein goes on to provide several other clear directions. The motions judge is not to engage "in a robust analysis of the merits at the certification stage" nor conduct "an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial". After a certification order has been issued the court may, at a later date, revisit the issue and change its mind when:

> "additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)). (at ¶105)

[45] Justice Rothstein then addresses the importance of what the Ontario Divisional Court described as the court's "gatekeeper function" in **2038724 Ontario Ltd. V. Quizno's Canada Restaurant Corp.**, 2009 CarswellOnt 2533, [2009] O.J. No. 1874 at ¶31 and 33:

> 31 The common issues requirement is a "low bar". Common issues need not determine liability. They may make up a very limited aspect of the liability. They need only be issues of fact or law which will move the litigation forward and avoid duplication. Many individual issues, including damages, may remain to be decided after the resolution of a common issues trial: *Hollick, supra* at paras. 16, 18, 25; *Carom v. Bre-X Minerals Ltd.*, (2000) 51 O.R. (3d) 236 (C.A.), leave to appeal denied, [2000] S.C.C.A. No. 660 at paras. 40-41; C*loud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 52, leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50 [*Cloud*].
>
> ...
>
> 33 Nonetheless, the Court performs a gatekeeper function and cannot rely upon allegations alone. A plaintiff must adduce "some basis in fact" to show that issues are common: *Hollick*, *supra* at para. 25.

when, in his reasons, he emphasized:

> [103] ... it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.

[46] From all of this I conclude that if a potential defendant to a class proceeding were inclined to offer "rebuttal evidence" in an effort to resist the application, the objective must still be to persuade the motions judge that the class representative

had failed to show *some basis in fact* for each of the certification criteria contained in the **Act**. Rebuttal evidence purporting to challenge or contradict the plaintiff's evidence does not change the test. In all cases the motions judge is obliged to subject all of the evidence (from whatever source) to a degree of inspection which is more than "a superficial level of analysis that would amount to nothing more than symbolic scrutiny". Whether or not the proposed defendant chooses to present rebuttal evidence or simply attempt to defeat the application based on written and oral argument, the motions judge is still obliged, at the end of the day, to decide whether the class representative has presented sufficient facts to persuade the court that the conditions for certification have been met.

[47] Judges faced with certification applications must be very careful in their assessment of the evidence called by either the proposed plaintiff or the proposed defendant. Obviously the factual assertions presented by each side must be fairly considered in order to decide whether the plaintiff has met the burden of showing some basis in fact for each of the statutory criteria under the Act. That evaluation by the judge needs to be more than a mere perfunctory exercise. It must rise above a superficial analysis amounting to little more than symbolic scrutiny. However, the judge must not veer into an evaluation of the merits of the claim, or the probative weight of the evidence said to support it, or the potential for success. To me, obliging a motions judge to embark upon such a detailed, comparative analysis would run afoul of Justice Rothstein's very clear directions in **Pro-Sys** which prohibit "the finely calibrated assessments of evidentiary weight". See as well, **Dell'Aniello c. Vivendi Canada inc**., 2014 SCC 1, at ¶69-70.

[48] A fair reading of Justice Wood's decision as a whole satisfies me that he understood and correctly applied these same legal principles to the issues before him. He specifically referred to this Court's decision in **MacQueen**, as well as other leading authorities such as **Fulawka**; **Western Canadian Shopping Centres**; **Hollick**; **Pro-Sys**, and **Jones v. Zimmer**, 2013 BCCA 21, among others. The judge identified the evidence proffered by the appellants and reviewed that evidence in considerable detail before ultimately deciding that Mr. Taylor met the factual threshold for certification. He explained how that evidence differed in material respects. He clearly understood his limited role, at the certification stage, when considering conflicting evidence. For example, when dealing with the question of common issues, he said:

> [38] This is the criterion which the defendants most strenuously argue has not been met. Their position is that there are many factors which could contribute to

the fracture of a WPHIS which are specific to the patient or the procedure, and are not a function of the manufacture or design of the device by the defendants.

[39] The defendants also say that there is an insufficient evidentiary basis to establish the existence of a common issue with respect to whether the WPHIS was defective.

[40] Before considering the particular concerns raised by the defendants, I need to consider the nature of the evidence required in order for a plaintiff to establish the existence of common issues.

...

[45] In assessing whether common issues exist among the class members, the court is not concerned with the strength or weakness of the plaintiff's claims. To the extent that there may be conflicting evidence, that is not something that should be resolved at the certification stage. The same holds true with respect to differences of opinion between experts.

[46] The defendants argued that resolution of the proposed common issues would not advance the litigation terribly far because of the remaining individual assessments that would be required. In particular, they submitted that determining why any particular component of the WPHIS fractured for a certain plaintiff will require consideration of many individual circumstances. Although there is some overlap in considering whether there are common questions between class members and the assessment of the preferred proceeding for resolution of the claims, I prefer to deal with the defendants' argument under the latter criterion rather than in my consideration of whether common issues exist.

...

[48] An issue is considered to be common if its resolution is necessary to the determination of each class member's claim. The first two common issues proposed by the plaintiff are broadly stated; however, I am satisfied that they will arise in relation to the claims of each class member. Whether the WPHIS was defective and whether any of the defendants breached a duty of care to class members are clearly common issues.

[49] Whether the defendants' conduct ought to attract punitive damages should also be resolved on a class wide basis; however, the quantification of punitive damages cannot take place until the amount of compensatory damages, if any, has been determined. The compensatory damages require an individual consideration of the circumstances of each class member and cannot be quantified on a class wide basis.

[50] Assessment of liability for punitive damages can be done in a common hearing but quantification must wait until after the determination of compensatory damages. For this reason, I believe that the third common issue proposed by the plaintiff should be revised to read as follows:

> Does the defendants' conduct warrant an award for punitive damages, and, if so, to whom should they be paid?
>
> [51] If the plaintiff is successful on the first two common issues and the matter proceeds to individual assessments of damages, it may be necessary to have a further common hearing on the quantification of punitive damages. That is a matter that can be determined by the case management judge or trial judge at the appropriate time.
>
> [Underlining mine]

[49] Not all of the respondent's grounds for certification met with success. As noted at ¶25, **supra**, Justice Wood rejected the respondent's claim that a common issue existed with respect to the **Sale of Goods Act.**

[50] Insofar as the question of preferable procedure was concerned, the motions judge considered the appropriate factors, recognizing that this involved a comparison and weighing of the available alternatives. He said:

> [54] Section 7(2) of the *Class Proceedings Act* sets out factors which the court must consider in determining whether a class proceeding would be preferable for the fair and efficient resolution of the dispute.
>
> [55] The assessment of this criterion involves a comparison of the alternatives. In this case, the only alternative procedure proposed by the defendants was to have class members proceed with individual claims.
>
> [56] This is not a situation where the individual damages are minimal with a result that individual proceedings are not economically feasible. The size of the potential class appears to be relatively small and; therefore, the pooling of resources and the sharing of the financial risk is not as much of an advantage as it might be with a larger class where the individual damage claims are small.
>
> [57] Success on the common issues will not resolve the plaintiff's claims. It will be necessary to have further hearings to quantify damages. As with any claim for personal injury damages, the assessment will depend upon the particular circumstances of the individual. This will necessitate separate hearings. On the issue of causation, the defendants say that individual circumstances will have to be considered. There was evidence filed on the motion to suggest that fracture of a component of the WPHIS may be caused or contributed to by a number of factors, including conduct of the patient. These are all matters which need to be considered in deciding whether a class proceeding is the preferable procedural route for resolution of the claims of class members.
>
> [58] I am satisfied that the plaintiff has shown some basis in fact for the assertion that a class proceeding would be the preferable procedure. The determination of the common issues will be a significant component of each class

> member's claim. Deciding whether there was a defect in the device or if the defendants breached a duty of care will involve extensive and technical expert evidence. It would not be an efficient use of the resources of the courts or the parties to have these issues litigated in individual proceedings. There would be a distinct advantage in having them decided in a single hearing, with the result binding on the defendants and all class members. Even though the class is relatively small, the potential sharing of costs and resources across the class would be an advantage.
>
> [59] The defendants argued that the individual causation issues would undermine any efficiency gained by a class proceeding. At this early stage, it is difficult to know the extent to which individual issues may arise. If the plaintiff is successful in establishing a defect which leads to premature fracture of the WPHIS, contributing factors, such as the patient's lifestyle or the surgeon's proficiency, may well be much less significant. I do not believe that any individual causation issues which might exist are sufficient to overwhelm the common issues that I have certified.
>
> [60] The defendants also suggested that the relatively small class should not be certified on a national basis because of difficulties administering the proceeding. They did not explain why this should be an impediment to certification. Having individuals spread over a large geographic area should not impact the common issues hearing. It may arise on the individual damage assessments if the matter gets that far however expenses in having video testimony or witnesses and counsel travelling to a hearing in another province can be dealt with as part of a cost award. There is no reason to refuse certification of this as a national class simply because it may be small in number.
>
> [Underlining mine]

[51] After thoroughly reviewing the record I see nothing here which would warrant our intervention. Justice Wood did not err in principle. His consideration of the evidence and his weighing and balancing of the many factors arising from the issues before him, has not exposed any palpable and overriding error. He addressed the appellants' rebuttal evidence to the extent necessary. His consideration of that evidence was much more than a "superficial analysis" amounting to "nothing more than symbolic scrutiny". On the contrary, his decision reflects a careful assessment of whether the respondent had presented sufficient facts to satisfy the court that his claim should proceed on a class basis. I can find no fault in his reasoning or conclusion.

[52] Accordingly, while leave to appeal has been granted, I would not intervene.

Conclusion

[53] I would dismiss the appeal. As for costs, the parties agreed on quantum. I accept the figure proposed and would award the respondent his costs of $4,000.00 plus reasonable disbursements as agreed or taxed.

Saunders, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.