SUPREME COURT OF NOVA SCOTIA

Citation: Taylor v. Wright Medical Technology Canada Ltd., 2014 NSSC 89

Date: 20140307
Docket: Hfx No. 355381
Registry: Halifax

Between:

Ken Taylor

Plaintiff

v.

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

Respondents

LIBRARY HEADING

Judge:	The Honourable Justice Michael J. Wood
Heard:	August 15, 2013 (in Chambers), in Halifax, Nova Scotia
Final Written Submission:	December 19, 2014
Written Decision:	March 7, 2014
Subject:	Class Proceedings - Certification

Summary: The plaintiff suffered a premature fracture of a component of the artificial hip supplied by the defendants. He sought certification of a class proceeding representing members who had similar fractures.

Issue: Should the proceeding be certified under the *Class Proceedings Act*?

Result: The Court was satisfied that the certification should be granted on the evidence presented. The application of the *Sale of Goods Act* was not found to be a common issue. Quantification of punitive damages, if any, was deferred until after assessment of individual damages. A small class was not an impediment to certification on a national basis.

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Defendants

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Counsel:	Raymond F. Wagner, Q.C. and Michael Dull, for the Plaintiffs Scott C. Norton, Q.C., Daniel M. Boone and Scott R. Campbell, for the defendants

By the Court:

[1] In June, 2007, Ken Taylor had his left hip replaced as a result of osteoarthritis. The surgeon used a Wright Profemur Hip Implant System ("WPHIS"). In September, 2009, Mr. Taylor underwent revision surgery to his left hip as a result of the fracture of one component of the WPHIS.

[2] Mr. Taylor has brought this proceeding against the defendants alleging that they were negligent in the design and manufacturer of the WPHIS. He is proposing that it be certified as a class proceeding under the *Class Proceedings Act*, S.N.S. 2007, c.28.

[3] The defendants oppose certification primarily on the basis that Mr. Taylor has not met the evidentiary burden on him to establish the necessary criteria. Unlike most product liability class proceedings, there has been no product recall, government warning or acknowledgment by the defendants that WPHIS is in any way defective.

CRITERIA FOR CERTIFICATION

[4] Section 7(1) of the *Class Proceedings Act* sets out the criteria which must be met before the court can certify a matter as a class proceeding. That section states as follows:

> 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.

[5] The factors to be considered in determining whether a class proceeding would be preferable under s. 7(1)(d) are found in s. 7(2) of the *Act*, which provides:

> (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.

[6] Other than the requirement that the pleadings disclose a cause of action, the plaintiff has the burden of establishing the remaining criteria on evidence. The burden on the plaintiff is to show "some basis in fact" for each of the criteria. This is obviously a very low threshold and indicates that the court is not to engage in the

assessment or weighing of evidence on a certification motion. A defendant may choose to provide evidence to rebut that filed by the plaintiff, but if they wish to avoid certification, they will have to satisfy the court that there is no basis in the evidence for one or more of the certification criteria.

NATURE OF THE PLAINTIFF'S CLAIMS AND THE SCOPE OF THE PROPOSED CLASS ACTION

[7] Mr. Taylor's statement of claim alleges that the defendants were negligent in the design, development, testing, manufacture, distribution, marketing and sale of the WPHIS resulting in the premature facture of one of the components of that system.

[8] Mr. Taylor also pleads and relies upon the *Sale of Goods Act*, S.N.S., 1989, c. 408 and, in particular, the implied warranties of merchantable quality and fitness for intended purpose found in that legislation.

[9] The proposed class for certification consists of all persons who received a WPHIS after February, 2001 and suffered a fracture of a component of that system.

[10] The common issues which are proposed by the plaintiff are as follows:

> 68. The Plaintiffs propose the following list of common issues:
>
> a) Was the Wright Profemur Hip Implant System defective or unfit for its intended use?
>
> 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 and in what amount?
>
> d) With respect to Nova Scotia residents, did any of the Defendants breach a statutory duty under the *Sale of Goods Act*, S.N.S. 1989, c. 408, s. 1?

EVIDENCE ON THE MOTION

[11] In light of the defendants' submission that the plaintiff has not met the burden of showing some basis in fact for certification, I will review the evidentiary record in some detail. Each party filed affidavits and no deponents were cross-examined. Neither party made any specific challenge to the admissibility of any of the affidavit evidence, although each made submissions with respect to the weight to be given to the opinion evidence provided by the other party.

The Plaintiff's Evidence

Ken Taylor

[12] Mr. Taylor's affidavit recites that he received the WPHIS implant in June, 2007 and that it fractured in September, 2009, requiring further surgery. He says that he is prepared to act as a representative plaintiff and accepts the responsibilities associated with that status.

Michael Dull

[13] Mr. Dull indicates that he is one of the lawyers representing the plaintiff. His affidavit states that his firm has been contacted by twenty-nine people who received a WPHIS and that fifteen of these people advised of "earlier than expected failures" and have undergone revision surgery.

Rod Desborough

[14] In his affidavit, Mr. Desborough says that in April, 2007 he underwent a hip replacement and received a WPHIS. In April, 2010, he experienced a "failure" of his WPHIS and underwent revision surgery.

Dr. David J. Zukor

[15] Dr. Zukor is the Chief of the Department of Orthopaedic Surgery at the Jewish General Hospital and an Associate Professor in the Department of Surgery at McGill University. Attached to his affidavit is a report that he prepared after perusing Mr. Taylor's medical records, as well as relevant orthopaedic and implant literature.

[16] After reciting Mr. Taylor's history of a hip replacement in June, 2007, followed by a fracture of the modular neck of the femoral component of the WPHIS in September, 2009, he provides an overview of the treatment of total hip arthroplasty. He says that normally it is reasonable to expect a minimum of twenty years of good function from a hip replacement. The usual limitation is wearing out of the bearing surface and only very rarely is there a fracture of a component. Dr. Zukor describes Mr. Taylor's fracture of the femoral component as a "relatively rare complication".

[17] Dr. Zukor summarizes the result of his literature review and notes a report of the Australian Hip Registry which indicated a higher than normal failure rate for the femoral component of the WPHIS.

[18] Dr. Zukor was cross-examined out-of-court and a transcript of his testimony was filed. In that testimony, he said that he had not seen Mr. Taylor's hip implant and he had never personally used a WPHIS. He testified that a revision is any surgery to redo part or all of the implant. He said that a revision might result from a number of factors including inadequate surgical technique, inappropriate device selection, improper placement of the device, patient characteristics, substance abuse, patient activity level and traumatic events.

[19] According to Dr. Zukor, the fracture of a device represents a small portion of revision surgeries. This could result from patient activity, the length of the femoral neck, poor sizing of the device, etc.

[20] Dr. Zukor acknowledged that the Australian Hip Registry Report dealt with situations where any revision was needed and was not specific to fractures. He does not know if any of the failures referred to in the Australian Report include fractures.

David S. Komm and Kerry Knapp

[21] Although Messrs. Komm and Knapp filed separate affidavits, the purpose was simply to introduce a report which they co-authored under the business name BTI Consultants. Mr. Knapp has a Ph.D in forensic biomechanics and Mr. Komm a Master of Science in mechanical engineering.

[22] The BTI Consultants' Report indicates that Mr. Taylor's WPHIS device was examined, but it was not possible to determine if there was a defect in manufacturing or design without carrying out destructive testing.

[23] Messrs. Komm and Knapp carried out a literature review, including an examination of the Manufacturer and User Facility Device Experienced Database ("MAUDE"), which is a record of adverse events involving medical devices maintained by the U.S. Food and Drug Administration. The disclaimer to the MAUDE data indicates that it is not intended to be used to evaluate rates of failure or to compare products. The Komm/Knapp review of the MAUDE records for the period January 1, 2004 to September 26, 2012 yielded six hundred and thirty-three reports relating to WPHIS. According to the Komm/Knapp analysis, fifty-one percent of the reported incidents involved break or fracture of the modular femoral neck component.

[24] Also included in the literature review was data from the Australian Orthopaedic Association National Joint Replacement Registry which showed a failure rate of the WPHIS to be eleven percent after sixty months; whereas the rate for all other conventional hip prosthesis was three point six percent. The conclusion of the BTI Consultants' Report states as follows:

> Based on our experience, inspection, research and analysis, it is well within the balance of probability that the Wright Medical Technology Canada Ltd. product Profemur hip prosthesis are subject to premature neck failure, either due to manufacturing or design issues.
>
> One mode of failure is neck fracture due to fatigue, which has been confirmed on the prosthetic utilized by Mr. Taylor and others. Other modes of failure may exist.
>
> The nature of the fatigue failure is that the fracture extends over time. Ultimately the component fails finally, abruptly and without warning. New reports of failures occur monthly and more are expected to occur.

Evidence of the Defendants

Debbie Daurer

[25] Ms. Daurer's affidavit indicates that she is a senior manager with the defendant, Wright Medical Technology, Inc. She says that she has reviewed records maintained by the defendants and tabulated information which was current to December 31, 2012.

[26] According to Ms. Daurer, the number of fractures of Profemur titanium modular necks was three hundred and forty-nine. With a total of two hundred and sixty-five thousand and fifty-nine units used, this represents a fracture rate of zero point one three percent. In the United States, the total number of fractures was one hundred and ninety-four out of four hundred and fifty-five thousand four hundred and seventy-seven implants, for a rate of zero point four three percent. In Canada, the total number of fractured necks was thirty-three out of five thousand four hundred and ninety-six, for a fracture rate of zero point six zero percent. She says that Wright Medical has not received any reports of fractures of necks from Australia.

Byron A. Deorosan

[27] Mr. Deorosan has a doctorate in biomechanical engineering and his affidavit attaches a copy of a report that he prepared on behalf of the defendants.

[28] Mr. Deorosan reviewed the BTI Consulting Report and carried out his own literature review.

[29] Mr. Deorosan's rebuttal opinion to the expert report of Messrs. Komm and Knapp is stated to be as follows:

1. Fracture rates of Wright Medical's Profemur modular titanium neck are lower than fracture rates of modular titanium necks by other manufacturers as reported in the literature and be international joint registries.

2. The world-wide *fracture rate* (0.13%) of the Wright Medical Profemur titanium modular neck and the *total, world-wide revision rate* (0.44%) of the Profemur modular hip implant system are below guidelines recently disseminated by the National Institute for Clinical Excellence (UK), which indicated an expected *total revision rate* of 10% within 10 years, or 1% per year, for modular total hip implants.

3. Plaintiff expert's analysis of published failure rates to support their opinions is flawed, and their opinions comparing the performance of the Profemur titanium modular neck to other hip systems are without basis.

4. Plaintiff expert's analysis of the MAUDE database is flawed, and makes use of inaccurate and unreliable reports that do not reflect the actual occurrence of failure of the Profemur modular hip system, or fracture of the Profemur titanium modular neck.

ANALYSIS OF THE CERTIFICATION CRITERIA

Pleadings Disclose a Cause of Action

[30] For purposes of the certification motion, the defendants have conceded that the statement of claim, as amended, discloses a cause of action in negligence; however, they dispute the adequacy of the pleadings with respect to the *Sale of Good Act*. Paragraphs 40 and 41 of the amended statement of claim set out the allegations with respect to the *Sale of Goods* claim and they read as follows:

40. The Plaintiff pleads and relies upon the *Sale of Goods Act*, R.S. c. 408, s.1. The Profemur Hip Implant System was purchased by the Plaintiff and Class Members pursuant to agreements within the meaning of the *Sale of Goods Act*. The Defendants represented the Profemur Hip Implant System as a suitable, safe, effective, minimally invasive hip replacement, and as a "high performance" system. The Defendants represented the Profemur Hip Implant System as having advantages over other hip replacement or resurfacing systems. These representations were in fact false, misleading or deceptive.

41. The Plaintiff pleads that the Profemur Hip Implant System was neither fit for its intended purpose nor of merchantable quality as suitable, safe, effective, minimally invasive hip replacement and as a "high performance" system, or as having advantages over other hip replacement or resurfacing systems. In making contrary representations, the Defendants acted in breach of section 17 of the *Sale of Goods Act.*

[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.

Identifiable Class

[33] In order to satisfy this criterion, the plaintiff must provide evidence to show that there is some basis in fact for the existence of an identifiable class of two or more persons that could be represented by Mr. Taylor. In this case, the plaintiff proposes that the class consist of Canadian residents who have been implanted with a WPHIS after February, 2001 who have suffered a fracture of the device. According to the affidavit of Debbie Daurer, there were potentially thirty-three members of the class as of December, 2012. The affidavit of Mr. Dull indicated that as of October, 2012, his firm had been contacted by fifteen people who had experienced failures of their WPHIS. The affidavit does not indicate whether the failures consisted of fractures which would bring these people within the scope of the proposed class.

[34] Although the number of potential members is relatively small, the proposed class is easy to define. There should be no confusion with respect to whether a particular person meets the requirements for inclusion.

[35] The only argument advanced by the defendants in opposition to the class is the suggestion that it should not be national in scope because of the relatively low number of potential members. The suggestion seemed to be that this might be difficult to manage if members were spread throughout the country.

[36] In my view, to the extent that there is merit to the defendants' concerns, I believe that it is most appropriately addressed in considering whether a class proceeding would be preferable for the fair and efficient resolution of the dispute. It is not relevant to the question of whether there is an identifiable class.

[37] I am satisfied that the plaintiff has met this criterion for certification.

Common Issues

[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.

[41] A useful analysis of the manner in which the existence of common issues should be approached on a certification motion is found in the British Columbia Court of Appeal decision in *Jones v. Zimmer GMBH,* 2013 BCCA 21. That case also involved claims relating to alleged defects in a medical device used in hip replacement surgery. After noting that a "common issue" must be one which is a substantial and necessary ingredient of the claim of each class member, the Court went on to consider the appellant's argument that there was insufficient evidence of the existence of defects found in Canada to justify certification. The particular question which was under scrutiny on the appeal was framed as follows:

> Was the Durom Acetabular Hip Implant defective and/or unfit for its intended use?

[42] The respondent had filed an expert report stating that the failure rate exceeded what would be expected for an average hip replacement device. The appellant's responding report said that there were a number of individualized factors unique to each patient which would affect whether failure occurred. It said that in Canada the failure rate was in fact quite low and not a cause for concern. This evidence is very similar to that filed by the parties on this motion. The defendants here point out that in the *Jones* case, the manufacturers had issued a notice to Canadian surgeons alerting them to certain issues with respect to the use

of the device in question. There has been no such acknowledgment of responsibility by the defendants in this litigation.

[43] The British Columbia Court of Appeal dismissed the appeal and rejected the argument that evidence of a specific defect in the device was necessary before that issue could be certified. The Court's rationale is found in the following passage:

> 34 The appellants submit the certification judge failed to appreciate that whether the Durom Cup was defective and/or unfit for its intended use could not be certified as a common issue unless there was some evidence that the cause of the failures in Canada was a defect in the Cup and some evidence that these defects were common across the class. They note that the respondents pleaded the Cup was defective because it failed to adhere to the surrounding bone but did not plead any causal connection between this outcome and any particular defect. In their submission, it should have been fatal to the certification application that there was no evidence before the certification judge of any specific defect or of any causal relationship between such a defect and the Canadian hip implant revisions identified in the evidence.
>
> 35 Similarly, the appellants contend there was no evidence of any particular deficiency in their initially-recommended surgical technique and no evidence of any causal relationship between any such deficiency and the failed Canadian implants.
>
> 36 In order to establish liability in negligence, each class member must ultimately prove that a specific defect in the Durom Cup or deficiency in the surgical instructions was a cause of the failure of his or her hip implant. However, proof of a causal connection between a defect or deficiency and an individual plaintiff's failed implant is, along with damages, the final step in a product liability action: *Harrington* at para. 46. Causation and damages are individual issues, but proof of a defect in the Cup or a deficiency in the surgical instructions is a substantial and necessary factual link in the chain of proof leading to liability for every member of the class. One or more of the respondents' allegations of defects and deficiencies must be proven before the question of individual causation can be reached. It follows that proof of a defect in the cup or a deficiency in the surgical instructions is an issue common to all plaintiffs, the resolution of which will move the litigation along significantly. Accordingly, I would reject the submission that the chambers judge erred in certifying question (a) as a common issue without evidence of a specific defect or deficiency and without evidence that specific defects or deficiencies were common to the failed implants of all class members.

[44] Recently, the Nova Scotia Court of Appeal considered the legal test for determining common issues in *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143. The Court adopted with approval the following legal principles enunciated by the Ontario Court of Appeal:

> [123] The legal principles relating to common issues were summarized in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at ¶81 as follows:
>
> > 81 There are a number of legal principles concerning the common issues requirement in s. 5(1)(c) that can be discerned from the case law. Strathy J. provided a helpful summary of these principles in **Singer v. Schering-Plough Canada Inc.,** 2010 ONSC 42, 87 C.P.C. (6th) 276. Aside from the requirement just described that there must be a basis in the evidence to establish the existence of the common issues, the legal principles concerning the common issues requirement as described by Strathy J. in **Singer,** at para. 140, are as follows:
> >
> > > The underlying foundation of a common issues is whether its resolution will avoid duplication of fact-finding or legal analysis: **Western Canadian Shopping Centres Inc. v. Dutton**, 2001 SCC 46, [2001] S.C.R. 534 at para. 39.
> > >
> > > An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: **Cloud**, at para. 53.
> > >
> > > There must be a rational relationship between the class identified by the plaintiff and the proposed common issues: **Cloud**, at para. 48.
> > >
> > > The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: **Hollick**, at para. 18.
> > >
> > > A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: **Harrington v. Dow Corning Corp.,** [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

> With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: **Dutton**, at para. 40, **Ernewein v. General Motors of Canada Ltd.**, 2005 BCCA 540, 46 B.L.C.R. (4th) 234, at para. 32; **Merck Frosst Canada Ltd. v. Wuttunee**, 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-46 and 160.
>
> A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: **Williams v. Mutual Life Assurance Co. of Canada** (2000), 51 O.R. (3d) 54, at para. 39, aff'd (2001), 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and [2003] O.J. No. 1161 (C.A.); **Fehringer v. Sun Media Corp**. (2002), 27 C.P.C. (5th) 155 (S.C.J.), aff'd (2003), 39 C.P.C. (5th) 151 (Div. Ct.).
>
> Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: **Chadha v. Bayer Inc.**, 2003 CanLII 35843 (C.A.), at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and **Pro-Sys Consultants Ltd. v. Infineon Technologies AG**, 2008 BCSC 575, at para. 139.
>
> Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": **Rumley v. British Columbia**, 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 29.

[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. We will address the common issues as they relate to each certified cause which remains.

[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.

[47] Generally the requirement for common issues is relatively easy to satisfy. The Ontario Court of Appeal in *Pearson v. Inco Ltd.*, [2005] 205 O.A.C. 30 described this requirement as follows:

> 65 I did not understand Inco to dispute that there remained common issues despite the recasting of the claim. Inco does, as noted above, take the position that many of the common issues are of no real moment to the litigation because the case will stand or fall on the *Rylands v. Fletcher* claim. That is a matter to be considered in discussing the preferable procedure. The common issue requirement is a "low bar" to certification: *Cloud, supra* para. 52. As Goudge J.A. wrote in *Cloud* at para. 53, "an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and event though many individual issues remain to be decided after its resolution". Further, as he wrote at para. 58, "the fact that beyond the common issues there are numerous issues that require individual resolution does not undermine the commonality conclusion. Rather, that is to be considered in the assessment of whether a class action would be the preferable procedure."

[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.

[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*.

Preferable Procedure

[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.

Representative Plaintiff and Litigation Plan

[61] The defendants have agreed that Mr. Taylor is an appropriate representative plaintiff.

[62] The plaintiff has filed a litigation plan as part of the motion record. The defendants disagree with a number of aspects; however, very little time was spent at the certification hearing dealing with the particulars of the plan. Rather than attempt to address all of the potential components of the plan in this decision, I propose to hold a further case management conference to consider the parties' submissions and finalize the litigation plan.

DISPOSITION

[63] I am satisfied that Mr. Taylor has met the burden of showing some basis in fact for each of the certification criteria found in s. 7 of the *Class Proceedings Act*. For that reason, I will certify this proceeding under that legislation. The scope of the class and the common issues will be as I have previously described.

[64] A case management conference will be scheduled by no later than May 31, 2014 for purposes of finalizing the litigation plan. In the event that the parties cannot agree on the disposition of costs relating to the certification motion, they will be dealt with at that time.

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Wood, J.