CITATION: *Pollack v. Advanced Medical Optics Inc.*, 2011 ONSC 1966
COURT FILE NO.: 07-CV-333992CP
DATE: 20110328

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **Donna Pollack, Daniel Pikelin et al.**, Plaintiffs/Moving Parties

AND:

Advanced Medical Optics, Inc. and AMO Canada Company, Defendants/Respondents

BEFORE: G.R. Strathy J.

COUNSEL: *Joel P. Rochon* for the Plaintiffs/Moving Parties

Malcolm Ruby and Nicholas Kluge, for the Defendants/Respondents

HEARD: March 3, 2011

REASONS FOR JUDGMENT – CERTIFICATION

[1] The plaintiffs move for certification of this action on behalf of all residents of Canada, excluding residents of Québec and British Columbia, who purchased and/or used AMO® Complete® All-In–One Moisture Plus contact lens care solution (the "Solution"). The Solution was voluntarily recalled from markets in Canada and worldwide in May 2007 after the U.S. Centers for Disease Control ("CDC") provided the manufacturer with data suggesting a possible association between the Solution and *Acanthamoeba keratitis* ("AK"), a rare debilitating eye infection that can result in extreme pain, blurred vision, light sensitivity, permanent vision loss, corneal transplants and, in some cases, surgical removal of the eye.

[2] A national class action was certified by the Supreme Court of British Columbia on May 26, 2009: *Chalmers (Litigation guardian of) v. AMO Canada Co.*, 2009 BCSC 689, [2009] B.C.J. No. 1030 ("*Chalmers*"). An appeal of that decision was dismissed, with a variation to the common issues, by the British Columbia Court of Appeal on December 8, 2010: *Chalmers (Litigation guardian of) v. AMO Canada Co.*, 2010 BCCA 560, [2010] B.C.J. No. 2451 (C.A.). The class in that action was defined as "All persons resident in Canada who purchased or used the Contact Lens Solution and who contracted Acanthamoeba Keratitis after using the Contact Lens Solution." That action is an opt-out class action for residents of British Columbia and an opt-in action for a sub-class composed of residents of other provinces. Common issues of negligence and punitive damages were certified for all class members and an issue of breach of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, was certified for residents of British Columbia.

[3] Notice of certification has been deferred in *Chalmers* pending the outcome of this motion, to avoid possible duplication or conflict between notices.

[4] The proposed class definition in this action will exclude residents of Québec and British Columbia and persons who opt into the British Columbia class action.

[5] While denying an association between the Solution and AK, AMO Canada Company ("AMO") does not contest that: (a) the statement of claim discloses causes of action in negligence and waiver of tort, (b) there is an identifiable class of two or more persons, (c) the statement of claim raises common issues in negligence and waiver of tort, and (d) Mr. Pikelin and Ms. Pollack are appropriate representative plaintiffs.

[6] AMO opposes certification of punitive damages and prejudgment interest as common issues. Furthermore, and in any event, AMO asserts that any common issues the court may certify relating to waiver of tort and punitive damages should be bifurcated to await resolution of both the common issue trial on negligence and individual issue trials that will determine compensatory damages.

[7] The principal point of contention between the parties on this motion is whether ordering a common issues trial on negligence in Ontario is the preferable procedure for dealing with that common issue.

[8] For the reasons that follow, I have concluded that this action should be certified as a class proceeding. I have also concluded that the action should not be stayed and that judicious case management, in a spirit of comity and collaboration with the management of the *Chalmers* class action, can ensure that the issues between the parties proceed to resolution in an efficient and fair manner.

Background

[9] Advanced Medical Optics, Inc., now known as Abbott Medical Optics, is a Delaware corporation. AMO Canada Company is a Nova Scotia corporation with its Canadian head office located in Markham, Ontario. AMO develops, manufactures, and markets medical devices relating to the eye and eye care, including contact lens care products. The contact lens products include multi–purpose cleaning and disinfecting contact lens solutions.

[10] AMO's products and operations are subject to regulation in Canada by Health Canada and in the United States by the Food and Drug Administration (the "FDA"). In particular, Health Canada and the FDA regulate the research, testing, manufacturing, safety, labeling, storage, record keeping, promotion, distribution, and production of medical devices.

[11] The Solution was approved by Health Canada and was first sold in Canada in September 2003. The Solution was different from earlier solutions marketed by AMO because it included propylene glycol as a moisturizer and a phosphate buffering system. It has been suggested that this change in the composition of the Solution may have created an environment in which the AK microbe formed itself into a cyst in the eye in order to protect itself from attack by the disinfectants.

[12] The Solution was never sold directly to Canadian consumers. AMO sold the Solution to pharmacies, retailers, or wholesale distributors who, in turn, made sales to pharmacies and retailers.

[13] In late May 2007, AMO announced a voluntary worldwide recall of the Solution. The recall occurred after the CDC informed AMO of data showing that between January 2005 and May 2007, 46 patients in the United States had developed the AK infection.

[14] There are a number of known risk factors for AK. The most common is the use of soft contact lenses. Among the 46 patients in the CDC study who developed AK, 39 were soft contact lens wearers, 21 of whom reported using the Solution. Other risk factors include exposure to contaminated water, swimming with contact lenses, improper care of contact lenses, and overnight wear of contact lenses.

[15] When informed of the CDC data, AMO voluntarily recalled the Solution as a precautionary measure, even though it did not know whether AK was caused in the 21 users by the Solution, or by some other risk factor.

[16] In its public statements in 2007, the CDC noted that AMO had voluntarily recalled the Solution after the CDC had made public the results of its investigation. The CDC stated that withdrawal of the Solution from the North American market was not based on any evidence that the Solution was contaminated. The CDC also clarified that, in its view, the Solution does not "cause AK"; rather, it was "more likely" that the Solution could allow AK to occur, although the exact mechanism for this association was said to be unknown. The CDC noted that it and the FDA were "working closely with the manufacturer to collect additional information and to continue to alert and advise consumers as more information becomes available." The CDC further noted that other potential risk factors were being evaluated such as "hygiene, trauma, exposure to water, and past medical history" and that its investigation was "far from over."

[17] In its public advisory regarding the recall on May 30, 2007, Health Canada stated that to that date there had been no cases reported in Canada linking AK to the use of the Solution. It is currently estimated that the number of Canadian cases is in the range of 30-40.

[18] Following the recall, all users of the Solution in Canada and the United States were entitled to reimbursement from AMO for any unused product as well as for the cost of replacing any contact lenses cleaned with the Solution. AMO's reimbursement plan for Canadian consumers was the subject of a special media announcement posted on the homepage of its website on the day the Solution was voluntarily withdrawn, and it remained posted for over a year.

[19] AK is extremely painful. The infection has to be killed before can be treated and the therapy to kill the infection is itself excruciatingly painful and protracted. In some cases, an eye drop solution, described colloquially as "pool cleaner", had to be administered every hour, 24 hours a day, while the patient remained in a darkened room. The treatment was described as "very very painful", causing a burning sensation in the eyes. The treatment might be followed by corneal scraping, transplant or, if treatment is not effective, enucleation (removal) of the eye. The

evidence of Ms. Pollack, who is a school teacher, is that she has become legally blind in her right eye. It has had a devastating effect on her life.

[20] It is reasonable to assume that there will be a live issue at trial as to whether, on the existing state of medical knowledge, AMO knew or ought to have known that the Solution carried with it a risk that the user could develop AK.

The Test for Certification

[21] The test for certification is set out in s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*").

[22] The language of s. 5(1) of the *CPA* is mandatory. The court is required to certify the action as a class proceeding where the following five criteria are satisfied:

(a) the pleadings 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 the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[23] There must be a cause of action, shared by an identifiable class, from which common issues arise, that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of the behaviour of wrongdoers: see *Sauer v. Canada (A.G.)*, [2008] O.J. No. 3419 at para. 14 (S.C.J.).

Cause of Action

[24] The statement of claim pleads causes of action in negligence, strict liability, breach of warranty and waiver of tort. The plaintiffs seek certification only with respect to the claims in negligence and waiver of tort. AMO does not dispute that there is a properly pleaded cause of action in negligence. A similar concession was made in *Chalmers*, and a cause of action in

negligence was certified by Butler J. The statement of claim in this case clearly discloses such a cause of action.

[25] Nor does AMO dispute the pleading of a claim in waiver of tort. Common issues arising out of waiver of tort claims have been certified in a number of cases. The amount to be disgorged if waiver of tort is available may be a common issue: see *Peter v. Medtronic* (2007), 50 C.P.C. (6th) 133, [2007] O.J. No. 4828 (S.C.J.), leave to appeal to Div. Ct. refused (2008), 55 C.P.C. (6th) 242, [2008] O.J. No. 1916 (Div. Ct.); *LeFrancois v. Guidant Corp.* (2008), 56 C.P.C. (6th) 268, [2008] O.J. No. 1397 (S.C.J.) and [2008] O.J. No. 3459 (S.C.J.), leave to appeal to Div. Ct. refused (2009), 67 C.P.C. (6th) 9, [2009] O.J. No. 36 (Div. Ct.); *Lambert v. Guidant Corp.* (2009), 72 C.P.C. (6th) 120, [2009] O.J. No. 1910 (S.C.J.), leave to appeal to Div. Ct. refused (2009), 82 C.P.C. (6th) 367, [2009] O.J. No. 4464 (Div. Ct.); *Serhan v. Johnson and Johnson* (2004), 72 O.R. (3d) 296, [2004] O.J. No. 2904 (S.C.J.), aff'd (2006), 85 O.R. (3d) 665, [2006] O.J. No. 2421 (Div. Ct.), leave to appeal to C.A. refused Oct. 16, 2006 and leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 494; *Heward v. Eli Lilly & Co.* (2007), 39 C.P.C. (6th) 153, [2007] O.J. No. 404 (S.C.J.), aff'd (2008), 91 O.R. (3d) 691, [2008] O.J. No. 2610 (Div. Ct.); *Griffin v. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158, [2009] O.J. No. 418 (S.C.J.); *Robinson v. Medtronic, Inc.* (2009), 80 C.P.C. (6th) 87, [2009] O.J. No. 4366 (S.C.J.).

[26] Claims in both waiver of tort and negligence will therefore be certified.

Identifiable Class

[27] The plaintiffs propose the following class definition:

> All persons in Canada who purchased and/or used AMO® Complete® All-In-One Moisture Plus™ contact lens care solution, excluding residents of Québec and British Columbia and persons who opt into the *Chalmers* Class Action.

[28] The plaintiffs also propose a class of family member claimants who are entitled to assert a derivative claim for damages pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended, and comparable provincial and territorial legislation. Mr. Pikelin is the spouse of Ms. Pollack and is the proposed representative of the family class members.

[29] The proposed class does not conflict with the class in *Chalmers* because it excludes residents of British Columbia and those non-residents of British Columbia who opt into the *Chalmers* action.

[30] AMO objects to the breadth of the class definition. It says that the definition should be tied to the allegations of the statement of claim. The class approved in British Columbia was "All persons resident in Canada who purchased or used the Contact Lens Solution and who contracted Acanthamoeba Keratitis after using the Contact Lens Solution."

[31] AMO also says that there is no claim in the statement of claim on behalf of consumers who simply "used" the Solution, as opposed to those who used the Solution and contracted AK. I

do not accept that submission. The class is defined in the statement of claim to include "[A]ll persons in Canada who purchased and/or used the Solution ...". There is a specific allegation in the statement of claim that at the time of the Health Canada advisory of the recall of the Solution, consumers were informed that they should discard partially used or unopened bottles of the Solution and replace the lenses and storage containers (para. 15). This is followed by a claim by the plaintiffs and other class members for "[S]pecial damages for out of pocket expenses including those connected with medical treatment, medication and the cost of the Solution and discarded contact lenses" (para. 38(b)). I am satisfied that there is a pleading of a claim on behalf of a "user" class.

[32] AMO says that the class definition should be restricted, as it was in *Chalmers*, to those who contracted AK. It proposes the following definition:

> All persons in Canada who used AMO® Complete® All-In-One Moisture Plus™ contact lens care solution and allege they contracted Acanthamoeba Keratitis after using the solution, excluding residents of Québec and British Columbia and persons who opt into the *Chalmers* Class Action.

[33] In view of the plaintiffs' claims on behalf of users of the Solution who did not contract AK, based on waiver of tort or for compensation for discarded bottles of the Solution, lenses and lens cases, it would not be appropriate to restrict the class to those who contracted AK.

[34] I also have some difficulty with the use of the expression "who ... allege they contracted" AK, because class membership would be based on a subjective determination by the class member as opposed to an objective determination as required by *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at 554. In *Ragoonanan v. Imperial Tobacco Canada Ltd.*, [2005] O.J. No. 4697, Cullity J. declined to approve a similar class definition and gave extensive reasons, at paras. 7-49, for his decision. As well, as Mr. Rochon points out, the diagnosis of AK is difficult and class members would be required to self-diagnose in order to determine whether they are in the class or not.

[35] I make these remarks with deference to those judges in other jurisdictions, including Butler J. in *Chalmers*, who have approved classes involving users of drugs who "claim" or "allege" to have suffered a loss. Practices vary from province to province. Certainly in Ontario, it has been common in drug and medical device cases to certify "user" classes: see *Lambert v. Guidant Corp.*, above; *Peter v. Medtronic*, above; *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392 (S.C.J.).

[36] I will approve the class definition proposed by the plaintiffs, except the words "and/or" should be replaced by "or".

Common Issues

[37] The plaintiffs propose the following common issues:

General Causation

a) Was the Solution 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 both the defendants? If so, how?

Negligence

b) Did the defendants owe the plaintiffs and Class Members a duty of care?

c) If so, did the defendants breach such duty by, among other things, failing to ensure that the Solution contained the required combination of detergent and disinfectant to kill *Acanthamoeba* and prevent the development of AK?

Waiver of Tort

d) Can all or part of the Class elect to have damages determined through an accounting and disgorgement of the proceeds of the sale of the Solution to Class Members?

e) If part, but not all, of the Class can so elect,which part or parts of the Class can so elect?

f) Is the consent of the Ontario Health Insurance Plan ("OHIP") or any other provincial health insurer required to any such election?

g) If all or part of the Class can so elect, in what amount and for whose benefit is such accounting to be made?

h) Is OHIP or any other provincial health insurer entitled to a portion of such accounting?

i) Are Family Class Members who are family members of Class Members who elect to have damages determined through an accounting and disgorgement of the proceeds, precluded from recovery of damages and, if so, is their consent to such an election required?

Miscellaneous

j) Whether the plaintiffs and Class Members are entitled to punitive damages against the defendants and, if so, in what amount; and,

k) Whether pre-judgment interest is payable by the defendants and, if so, at what rate.

[38] I will address AMO's position on each of these issues below.

General Causation

[39] AMO submits that the general causation issue should not be certified because it goes beyond the scope of the common issues in the notice of motion, which framed the evidence that both sides prepared and relied upon for purposes of the motion. In any case, AMO says that proposed common issue (a) does not, contrary to the heading, deal with general causation. Rather, it appears to be based upon causes of action not relied upon by plaintiffs for purposes of the motion.

[40] In *Chalmers*, Butler J. certified the following common issue, which was one of two common issues that he described as the "negligence common issues":

> Was the Solution defective or unfit for its ordinary use?

[41] The common issue proposed in this action uses broader language. That language, while similar to common issues approved in other actions, is suggestive of a claim under the *Sale of Goods Act*, R.S.O. 1990, c. S.1, and is unnecessary and surplusage.

[42] In *Harrington v. Dow Corning Corp.* (2000), 193 D.L.R. (4th) 67, [2000] B.C.J. No. 2237 (B.C.C.A.) the British Columbia Court of Appeal described a similar common issue to the one proposed by Butler J. as "the first step in every products liability case alleging negligent design, manufacture or marketing" (at para. 42). A similar common issue, albeit in the broader language proposed by the plaintiff in this case, was approved by Cumming J. in *Wilson v. Servier*, above.

[43] I conclude that the question of whether the Solution was defective or unfit for its ordinary use is appropriate for the negligence claim. I would therefore approve the following:

> Was the Solution defective and/or unfit for its ordinary use?

[44] Mr. Ruby indicated that this common issue, which is consistent with the above "negligence" common issues in *Chalmers*, would be acceptable to his client.

Negligence

[45] AMO does not dispute the common issues relating to negligence. They are approved.

Waiver of Tort

[46] Under the waiver of tort doctrine, a plaintiff has the right to elect between compensatory tort damages and a restitutionary remedy of disgorgement. It was described by Cullity J. in *Heward v. Eli Lilly & Co.*, above, at para. 24, as follows:

> In certain circumstances, when tortious acts have been committed by a defendant, the person affected will be permitted to elect between the remedy of compensatory damages and an accounting for a disgorgement of profits. The tort is not waived in any

> meaningful sense as it provides the basis for whichever of the two remedies is chosen: *United Australia Ltd., v. Barclays Bank Ltd.*, [1941] A.C.1 (H.L.), at page 18. The use of the term "waiver of tort" has been criticised as misleading for that reason and, also, because, in the view of some learned commentators, the relevant decisions reflect a wider principle that is not confined to tortious wrongs. Despite this, it will be convenient for the present purposes to adhere to the traditional terminology.

[47] AMO does not contest certification of proposed common issue (d) relating to waiver of tort. It submits, however, that adjudication of this common issue should be bifurcated to be heard following the negligence trials. It says that bifurcation is necessary because class members will be unable to make an informed decision whether to elect a disgorgement remedy without the ability to compare the value of disgorgement with that of compensatory damages, which can only be determined after individual trials on causation and liability.

[48] There is no doubt that the court has jurisdiction to order bifurcated discovery and trial with respect to this claim: *Peter v. Medtronic*, above, (Div. Ct.) at paras. 17-19; *Air Canada v. Westjet Airlines Ltd.* (2005), 20 C.P.C. (6th) 141, [2005] O.J. No. 5512 (S.C.J.).

[49] AMO opposes certification of the remainder of the proposed common issues relating to waiver of tort – proposed issues (e) through (h) on the revised list – because it says there is currently no evidentiary foundation to show why these common issues are necessary to certify in the circumstances of this case. In any event, it says, the rights of OHIP and putative members of the family class are defined by legislation and the court hearing the trial on waiver of tort (if a trial takes place) should determine those entitlements based on the applicable statutory provisions and evidence presented at trial.

[50] The decision to bifurcate an issue is discretionary. It has been observed by the Divisional Court in *Peter v. Medtronic*, above, that class proceedings are inherently bifurcated, because the common issues are decided before the individual issues. The question here is whether I should bifurcate the common issue of waiver of tort by ordering that it be determined, if necessary, after both the trial of the common issues and the individual issues.

[51] In *Peter v. Medtronic*, the Divisional Court observed, at paras. 27-32:

> In exercising his discretion pursuant to s. 12 of the *CPA*, the motion judge is required to keep in mind the underlying policy objectives of that *Act*, including expeditious access to justice and judicial efficiency. Here, the motion judge noted that class proceedings are inherently bifurcated and concluded that it would be more efficient, expeditious and less costly to bifurcate the liability and quantification issues relating to waiver of tort.

In coming to his decision, he applied the factors from *Westjet, supra.* He concluded that entitlement to elect waiver of tort is independent and severable from the amount of an accounting or disgorgement arising from the waiver of tort claim. In my view, he correctly concluded there is a key threshold issue to be determined in relation to waiver of tort - namely, when is it that there has been a breach of a legal obligation giving rise to a claim to compensation in waiver of tort.

There is no merit to the appellants' argument that bifurcation will deprive the court of the full factual record needed to determine the waiver of tort claim. Given the facts of this case and the pleading, there is no need for extensive disclosure of the financial information sought at this stage of the proceeding.

The motion judge also concluded that the appellants would be unable to make an informed decision whether to elect a disgorgement remedy without the ability to compare the value of compensatory damages. Such damages can only be determined in this case after individual trials on causation and liability.

The appellants have made arguments that the time frame for the proceeding will be lengthened, and emphasized the vulnerability of class members because of their age and state of health. However, the motion judge concluded that bifurcation will advance the trial process while the discovery relating to quantification would delay the process. In effect, the appellants ask this court to weigh the factors in favour of and against bifurcation and substitute our decision. That is not our task on this appeal.

The decision of the motion judge was a reasonable one, based on a consideration of the factors in *Westjet*, as applied to the facts and pleadings in this case. Moreover, the motion judge made a finding that there would be serious prejudice to the respondents if discovery were not divided, given the potential impact on the respondents' competitive position. The appellants have not established any palpable and overriding error in the finding made by the motion judge.

[52] In *Westjet*, Nordheimer J. set out, at para. 31, certain factors to be considered by the court in deciding whether to exercise its discretion to order bifurcation. These are:

(i) Are the issues of liability clearly separate from the issues of remedies? Consideration might be given to whether the remedies issues are interconnected with, or dependent on, the liability issues;

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> whether the same or different witnesses will be called on the liability and remedies trials and whether the judge hearing the remedies trial would benefit from having seen and heard the evidence from the liability trial.
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> (ii) Is there an obvious advantage to all parties by having the liability issues tried first? This would include a consideration of whether there is a realistic prospect that the determination of the liability issues would put an end to the action.
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> (iii) Will there be a substantial saving of time and expense if bifurcation is granted? This would include consideration of whether the determination of the liability issues might shorten the remedies trial either by eliminating available remedies or narrowing the scope of relief that can be sought.
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> (iv) Will the overall timeframe of the proceeding be unduly lengthened by granting bifurcation? This would include a consideration not only of whether the liability and remedies trials taken separately would be longer in total court time than if done together, but also whether there is likely to be an inordinate delay in having both trials completed recognizing that appeals may be taken in the intervening period once the liability trial has been concluded.
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> (v) Do the parties agree that bifurcation is appropriate? The parties are in the best position to understand the advantages and disadvantages of bifurcating the proceeding and, as observed in *Elcano Acceptance*, considerable weight should be given to their views on the question.

[53] I do not regard this list as intended to be exclusive. Indeed, in *Peter v. Medtronic*, there was a finding by the motion judge, Perell J., that without bifurcation there would be prejudice to the defendant as a result of the disclosure of confidential and commercially sensitive business and financial information and it is clear that this factor weighed heavily in his decision.

[54] In *Peter v. Medtronic*, Perell J. described the case before him as "one of the extraordinary and rare cases where it would be fair and just to have divided discovery and to bifurcate the common issue of the quantification of the amount of the waiver of tort claim" (at para. 21). He noted the injunction granted by McMurtry C.J. in *Garland v. Consumers' Gas Co.* (2001), 57 O.R. (3d), [2001] O.J. No. 4651 (C.A.), which advice was adopted by the Supreme Court of Canada, [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21 that "litigation by instalments should be avoided" (at para. 90).

[55] I have decided that this is not one of those extraordinary and rare cases in which bifurcation should be ordered, at least at this time. Specifically, there will be production and discovery on the waiver of tort claim. I leave open for another day the question as to whether the common issues trial should be bifurcated. I have come to this decision by weighing the following factors:

> (a) the issue of liability is clearly separate from the availability of waiver of tort – there must be a determination of legal wrongdoing before there is any entitlement to waiver of tort: *Aronowicz v. Emtwo Properties Inc.* (2010), 98 O.R. (3d) 641, [2010] O.J. No. 475 (C.A.);
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> (b) moreover, individual trials on causation, liability and compensatory damages may be necessary, at least for those users of the Solution who actually developed AK, before those class members can make an informed decision on whether to elect disgorgement;
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> (c) on the other hand, there is a large group of class members, who did not develop AK but who nevertheless have a claim for discarded Solution, lenses and other incidental costs, for whom the determination of the negligence common issue is likely to be determinative of their right to recovery;
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> (d) bifurcation is likely to significantly delay access to justice of class members if they are successful on the negligence common issue – it will add a whole new layer of production and discovery, and potentially appeals, which can only serve to delay their ultimate compensation – I regard this delay, which could be described as "inordinate", as an important consideration;
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> (c) there is no reason to believe that the refusal to bifurcate will delay the proceeding or add significantly to the cost;
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> (f) there has been no evidence, and no argument, to show that the defendant would be prejudiced by disclosure of evidence in relation to the waiver of tort claim; and
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> (g) the parties are not in agreement on this issue and it is clearly opposed by the plaintiff.

[56] In summary, bifurcation of the waiver of tort common issue is not warranted in this case. It would significantly impede access to justice for the class as a whole and would cause an intolerable delay for Ms. Pollack and other class members who contracted AK. I will therefore certify common issues (d), (e) and (g).

[57] I will also certify common issues (f), (h) and (i). In my view, they are appropriate common issues of law relating to the rights of subrogated health insurers and family class members that will advance the determination of the waiver of tort issue.

Punitive Damages

[58] AMO contests certification of revised common issue (j) relating to punitive damages. In *Peter v. Medtronic*, 2010 ONSC 3777, [2010] O.J. No. 3056 at paras. 35 and 37, the Divisional Court addressed when punitive damages may be certified as a common issue:

> The starting point for analysis...must be the *Whiten* decision, *supra*. In that case, the Supreme Court of Canada emphasized that punitive damages are the exception, rather than the rule. The Court made it clear that "punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant". They are to be awarded only when misconduct would otherwise not be punished or where other penalties, including compensatory damages, are insufficient to accomplish the objectives of retribution, deterrence and denunciation. Finally, they are to be awarded in an amount "no greater than necessary to rationally accomplish their purpose."
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> ...
>
> The motion judge reasonably held that a trial judge would be unable to rationally and appropriately consider punitive damages without knowing the amount of compensatory damages as well as the degree of misconduct, the harm caused, and the availability of other remedies. This is consistent with what the Supreme Court said above at para. 94 of its reasons, as well as at para. 123. In this class proceeding, causation, liability and the quantum of compensatory damages will not be determined at the common issues trial. Therefore, the motion judge correctly concluded that entitlement to punitive damages cannot be determined at the common issues trial. [Emphasis added.]

[59] AMO submits that in this action, such matters as specific causation, liability to individual class members and the quantum of compensatory damages will not be decided at the common issues trial and therefore entitlement to punitive damages cannot be determined at the common issues trial.

[60] Alternatively, AMO submits that if punitive damages are certified as a common issue, the discovery and trial of that issue should be bifurcated to proceed after the hearing of all issues relating to negligence.

[61] In the appeal from the certification decision in *Chalmers*, the British Columbia Court of Appeal reviewed the punitive damages common issue at some length, noting the observations of Perell J. in *Robinson v. Medtronic*, above, and in his subsequent decision in *Goodridge v. Pfizer Canada Inc.*, 2010 ONSC 1095, 85 C.P.C. (6th) 267. The Court of Appeal held that although "the

ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials", it did not necessarily follow that no aspect of punitive damages could be certified as a common issue. A common issue that focused solely on the defendant's conduct could be an appropriate common issue. The Court of Appeal stated, at para. 31:

> Although the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, it does not follow, in my opinion, that no aspect of the claim of punitive damages should be certified as a common issue. It is my view that the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the trial in this proceeding where the other common issues will be determined. The focus will be upon the defendants' conduct, and there is nothing in this case that will require a consideration of the individual circumstances of the class members in order to determine whether the defendants' conduct is deserving of punishment. The ultimate decision of whether punitive damages should be awarded, and the quantification of them, can be tried as a common issue following the completion of the individual trials.

[62] The Court of Appeal concluded that it would be appropriate to certify a sub-issue relating to punitive damages and adopted a format for the common issue certified by the British Columbia Court of Appeal in *L.R. v. British Columbia [Rumley v. British Columbia]* (1999), 180 D.L.R. (4th) 639, [1999] B.C.J. No. 2633 aff'd [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, which focused on the conduct of the defendant. The common issues approved by the Court of Appeal in *Chalmers*, were as follows, at para. 35:

> [7](c) If either or both of the Defendants breached a duty of care owed to class members, was either or both of the Defendants guilty of conduct that justifies punishment?
>
> (d) If the answer to common issue 7(c) is "yes" and if the aggregate compensatory damages awarded to class members does not achieve the objectives of retribution, deterrence and denunciation in respect of such conduct, what amount of punitive damages is awarded against either or both of the Defendants?

[63] The Court of Appeal added:

> By wording para. 7(d) in this fashion, it will be clear that the final decision regarding punitive damages must await the outcome of

> the individual damage trials. The above wording may be amended as the judge having conduct of the pre-trial proceedings, or the trial judge, considers necessary and appropriate in the circumstances.

[64] Common issue 7(c) is similar to the common issue approved by Cullity J. in *Andersen v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136, [2003] O.J. No. 3556 (S.C.J.): "Does the defendants' conduct merit an award of punitive damages, and if so, in what amount?"

[65] While there is no hard and fast rule, it strikes me that there is much to be said for permitting the judge hearing the common issue as to negligence to make an assessment of the defendant's conduct for the purpose of the punitive damages analysis. In this particular case, having regard to my comments concerning the desirability of promoting expeditious access to justice, it is appropriate to certify a revised common issue, in the same language approved by the British Columbia Court of Appeal in *Chalmers*. The fact that the issue has been certified in *Chalmers*, and will be addressed at discovery and trial, is an additional factor to be considered in making this order.

Pre-Judgment Interest

[66] AMO submits that pre-judgment interest cannot be a common issue since individual trials will be required to assess damages: *Fischer v. IG Investment Management Ltd.*, 2011 ONSC 292, [2011] O.J. No. 562 (Div. Ct.) at paras. 76-80; *Ramdath v. George Brown College of Applied Arts and Technology* (2010), 93 C.P.C. (6th) 106, [2010] O.J. No. 1411 (S.C.J.) at para. 124. I agree with the defendant's suggestion that the issue of pre-judgment interest can be bifurcated to await a separate determination following the common and individual issues trials.

Preferable Procedure

[67] In *Chalmers*, Butler J. found that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. He rejected AMO's submission that the small class size would make individual actions or a test case preferable to a class action. He also rejected the submissions that the resolution of the negligence issues would not appreciably advance the liability issue and that the common issues would be "overwhelmed" by the individual issues.

[68] AMO does not dispute that this court could find that a class proceeding is the preferable procedure for the resolution of the issues. It submits, however, that the existence of *Chalmers* changes this scenario. It says that this court should not find a second class proceeding to be "the preferable procedure for the resolution of the common issues" when the same proposed common issues are being determined in another national class proceeding. AMO says that in this case, if the court certifies a common issues trial in Ontario relating to AMO's alleged negligence, it will be creating, and not avoiding, multiple proceedings and there will be a possibility of inconsistent results, thereby defeating the judicial economy principle.

[69] Alternatively, AMO submits that even if the court were to find that a class proceeding is the preferable procedure, it should exercise its inherent jurisdiction to stay this proceeding,

pending the outcome of *Chalmers*, relying on s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and ss. 12 and 13 of the *CPA*.

[70] In *Chalmers*, Justice Butler indicated that at the time of the hearing before him, there were fifteen known actions commenced against AMO in Canada, including that action. Two of those were individual actions and the remaining thirteen were proposed class actions, none of which had been certified. In this case, plaintiffs' counsel identified a total of eight current actions, including this action and *Chalmers*.

[71] There is a superficial attractiveness to promoting judicial economy by "parking" this action pending the outcome of *Chalmers*. This is particularly the case in light of AMO's concession that it will not re-litigate the liability findings made by the British Columbia Supreme Court. I have concluded, however, that it would not be just to stay this action, that it would not promote the fair and expeditious determination of all the issues between the parties and that judicial economy will in fact be promoted by allowing both actions to proceed, subject to judicious case management.

[72] In coming to this conclusion, I have considered the following circumstances:

> (a) The two proceedings are not identical – the classes are different. No person who is a class member in *Chalmers* can be a class member in this action and vice versa.
>
> (b) Some of the common issues are different. There is, of course, no issue in this action under the British Columbia *Business Practices and Consumer Protection Act* and there is no issue of waiver of tort in *Chalmers*.
>
> (c) The proceedings are at approximately the same early stage – both have been certified, but notice of certification has not yet been given and production and discovery have not taken place. This is not a case where the first action is so clearly advanced that the second action should be stayed. The fact that the proceedings are both in their initial stages will allow common production and discovery, thereby achieving efficiency and economy.
>
> (d) Plaintiffs' counsel in this action are part of a consortium of counsel who are collaborating in the prosecution of the various class actions and individual actions. AMO's counsel in both actions is the same. This will facilitate cooperation and co-ordination between the two proceedings.
>
> (e) Staying this proceeding will delay the resolution of claims and issues that are unique to this proceeding and will not be resolved in *Chalmers*. These include:
>
> > (i) the waiver of tort claims;
> >
> > (ii) claims of persons who did not contract AK, but went through painful testing as a result of suspected AK; and

(iii) claims of persons who did not contract AK but who were required to discard the Solution, contacts lenses and lens storage containers.

(f) As Cullity J. observed in *Tiboni v. Merck Frosst Canada Ltd.* (2008), 60 C.P.C. (6th) 65, [2008] O.J. No. 2996 at para. 39, the simultaneous prosecution of class actions in British Columbia, [Québec] and Ontario has been very common in the past. In my experience, it is not unusual for there to be some measure of joint case management of such proceedings, with the sensible cooperation of counsel and, if appropriate, liaison between the case management judges.

(g) Allowing both actions to proceed in tandem will facilitate settlement.

[73] There should be common production and discovery in both actions.

[74] I leave open the possibility that the parties may reach agreement on a single liability trial proceeding in one jurisdiction or the other. Failing that, the parties will be at liberty to move at a future date, after discoveries, that the trial of one action be stayed pending the resolution of the other action. It is not necessary to make the order at this time.

Representative Plaintiff

[75] AMO does not contest the suitability of Ms. Pollack and Mr. Pikelin to act as representative plaintiffs in this proceeding. Although AMO does not concede the suitability of the proposed litigation plan, and may ask for modification of the proposed plan, it does not argue that any deficiencies in the litigation plan render this proceeding unsuitable for certification.

Conclusion and Order

[76] For these reasons, an order will issue certifying this action as a class proceeding on the terms set out above. Counsel for the plaintiffs shall prepare the form of order required by s. 8 of the CPA and shall review it with counsel for AMO. Counsel should discuss and endeavour to agree on a form of notice and a notice plan. A case conference should be scheduled within the next 20 days to discuss the order, the notice and the notice plan. I would suggest that the parties confer with a view to ensuring consistency with respect to the notice and notice plan in this action and in *Chalmers*.

[77] Costs, if not resolved, may be addressed by written submissions.

G.R. Strathy J.

Date: March 28, 2011

CITATION: *Pollack v. Advanced Medical Optics Inc.*, 2011 ONSC 1966
COURT FILE NO.: 07-CV-333992CP
DATE: 20110328

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Donna Pollack, Daniel Pikelin et al

Plaintiffs/Moving Parties

AND:

Advanced Medical Optics, Inc. and AMO Canada Company,

Defendants/Respondents

REASONS FOR JUDGMENT
CERTIFICATION

Strathy, J.

Released: March 28, 2011