See para. 85

Case Name:

Serhan (Trustee of) v. Johnson & Johnson

PROCEEDING UNDER the Class Action Proceedings Act, 1992, S.O. 1992, c. 6
Between
Ahmad Serhan, deceased by his trustee without a will, Zein Ahmad Serhan, and Beverley Gagnon, deceased, by her trustee without a will, Bruce Allen Gagnon, Plaintiffs, and Johnson & Johnson, Lifescan Canada Ltd. and Lifescan, Inc., Defendants

[2011] O.J. No. 27

2011 ONSC 128

79 C.C.L.T. (3d) 272

8 C.P.C. (7th) 73

2011 CarswellOnt 40

195 A.C.W.S. (3d) 932

Court File No. CV-04-CV-278809CP00

Ontario Superior Court of Justice

C.J. Horkins J.

Heard: December 15, 2010.
Judgment: January 7, 2011.

(101 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Class counsel -- Fees -- Settlements -- Approval -- Application for approval of settlement of class action and for approval of class counsel fees allowed -- Action pertained to defendants' blood glucose monitoring products for diabetics -- Method of compensating settlement class, through distribution of diabetic

products and an educational program was most practical way of distributing benefits -- Fee of $1.5 million was approved because class counsel undertook significant risks in this case -- Class counsel demonstrated significant skill and competence.

Application for approval of the settlement of a class action and for approval of class counsel fees. This proceeding, which was commenced in August 2001, was certified as a class action on July 6, 2004 and the cause of action was waiver of tort. Waiver of tort was a legal fiction that allowed a plaintiff to claim from a tortfeasor the benefit he earned which was beyond the damage suffered by the plaintiff. The defendant LifeScan Inc. was an American company based in California. It was a wholly owned subsidiary of the defendant Johnson & Johnson. LifeScan Canada Ltd. was a Canadian corporation based in British Columbia. LifeScan Inc. developed, manufactured and marketed blood glucose monitoring products for individuals with diabetes. One of its products was the SureStep System, which was the focus of this action. It was launched in Canada in February 1996. The class certified consisted of all users in various parts of Canada who acquired the original version of the System, which had two design errors. There was no evidence of any injury in Canada that arose from either design issue. By 1998 these problems were addressed. The settlement had a cash value of $2.75 million and a product value of $1.25 million for a total value of $4 million. Direct distribution to the settlement class was uneconomic given the modest damages and the inability to locate the settlement class members, determine if they suffered damages and, if so, establishing their loss. The settlement class was to be compensated on a cy-pres basis with diabetic products and an educational program. There were no objections to this settlement. The representative plaintiffs supported and recommended approval of the settlement. Class counsel requested a fixed fee of $1.5 million inclusive of disbursements and taxes.

HELD: Application allowed. The manner of compensating the settlement class was the most practical way of distributing the benefits. Direct distribution would be uneconomic, given the modest damages and the fact that there was no cost-effective way of locating the class members, determining if they suffered damages and, if so, establishing their loss. The proposed distribution was directly related to the issues in the lawsuit and it would directly benefit the many people who suffered from diabetes. The fee was approved because there were significant risks that were undertaken in this case. There was the risk that the action would not be certified or that the certification would be reversed on appeal. There was also the risk that the class would be unsuccessful at the trial of the common issues on liability and the quantum or recovery. Class counsel demonstrated significant skill and competence.

Statutes, Regulations and Rules Cited:

Class Action Proceedings Act, 1992, S.O. 1992, c. 6, s. 29(2)

Competition Act, R.S.C. 1985, c. C-34, s. 52(1)

Counsel:

Paul Pape and *Kirk Baert*, for the plaintiffs.

Caroline Zayid and *Darryl Ferguson*, for the defendants.

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1 **C.J. HORKINS J.**:-- This is a motion for approval of the settlement of this class action and approval of class counsel fees. Notice of this approval hearing has been given to the class and no objections have been delivered.

2 Justice Cullity certified this proceeding as a class action on July 6, 2004, with the cause of action being waiver of tort: (*Serhan v. Johnson and Johnson*, [2004] O.J. No. 2904).

3 At the hearing of this motion, I approved the settlement and the class counsel fees with reasons to follow. These are my reasons.

BACKGROUND

4 The defendant LifeScan, Inc. is a U.S. corporation based in California, and is a wholly owned subsidiary of the defendant Johnson & Johnson. LifeScan Canada Ltd. is a Canadian corporation based in British Columbia. LifeScan, Inc. develops, manufactures, and markets blood glucose monitoring products for individuals with diabetes.

5 Diabetes is a chronic, often debilitating, and sometimes fatal disease in which the body either cannot produce insulin or cannot properly use the insulin it produces. This leads to high levels of glucose in the blood, which can damage organs, blood vessels and nerves.

6 People with diabetes who engage in effective self-monitoring of blood glucose levels have improved levels of glycated haemoglobin (A1C) which is a good measure of a person's average blood glucose level over the previous few months which leads to lower risk of a complication. For example, for every 1% drop in AlC levels, the risk of kidney, eye or nerve related complication is reduced by 40%. As a result, it is well recognized that self-monitoring of blood glucose to assess daily blood glucose control can help people with diabetes avoid serious complications.

7 LifeScan, Inc. developed, manufactured and marketed a blood glucose monitoring product called the SureStep System and this system is the focus of this action. The SureStep System was developed in the early 1990s and was launched in Canada in February 1996 (the "Original SureStep System").

8 The SureStep System consists of a self-monitoring device which allows individuals with diabetes to measure their own blood glucose levels. In order to obtain a blood glucose level reading, the individual pricks his or her finger using a lancet and applies a drop of blood to the membrane on

a reagent test strip (the "Strip"). The Strip must then be inserted into the glucose meter and information concerning the user's blood glucose level is displayed on an LCD screen.

9 The class certified in this action consists of all individuals in Ontario and elsewhere in Canada, except British Columbia and Quebec, who acquired one of the Original SureStep systems (as further defined in Justice Cullity's certification order).

10 The Original SureStep System had two design errors, as described below.

The Software Error

11 The Original SureStep System included a glucose meter which was designed to provide a numerical indication of blood glucose levels at a range between 0 and 27.8 mmol/L (or 500 mg/dL). Above 27.8 mmol/L, the meter would not give a numeric reading. In those circumstances a "HI" reading would be expected. However, the software used in the meter of the Original SureStep System contained an error that resulted in the meters sometimes (rarely) giving an "ER1" reading rather than a "HI" reading when the user had a blood glucose level above 27.8 mmol/L (the "ER1 Problem").

"Low Flier" Issue with the Strips

12 A second issue with the Original SureStep System related to Strip insertion. In particular, it was found that when a SureStep user failed to completely insert a Strip into the blood glucose meter, the meter could potentially give a lower-than-accurate blood glucose reading (the "Low Flier Problem").

13 The ER1 Problem and the Low Flier Problem form the basis of the plaintiffs' claim against the defendants. It is important to note that the Low Flier Problem only occurred between 0.5% and 1.5% of the time, and the ER1 Problem only occurred approximately 0.13% of the time. Further, there is no evidence of any injury in Canada arising from either design issue.

Corrective Action Taken By Defendants

14 The software in the SureStep meters was modified and the ER1 Problem was corrected in July 1997 (the "Corrected Meters"). Thereafter, new meters were manufactured by LifeScan, Inc. and distributed in Canada by LifeScan Canada so that, as of October 7 1997, LifeScan Canada only sold Corrected Meters in the Canadian marketplace. In addition, a voluntary recall of affected meters was undertaken.

15 LifeScan also re-designed the strips to address the Low Flier Problem, so that by mid-1998, LifeScan Canada began to distribute new strips for sale in the Canadian marketplace, which were not subject to the Low Flier Problem.

The Action is Commenced

16 On August 9, 2001, the plaintiffs commenced this action, on behalf of all persons in Canada, except those in British Columbia and Quebec, claiming damages for negligence, negligent and fraudulent misrepresentation, breach of section 52(1) of the *Competition Act*, R.S.C., 1985, c. C-34 and conspiracy relating to the manufacture, sale and distribution of the SureStep Meters and Strips.

17 The plaintiffs also claimed that the defendants held all the revenue generated from the sale of the SureStep Meters, Strips and associated paraphernalia in a constructive trust for their benefit and for that of the other Class members. The plaintiffs sought disgorgement of such revenues and punitive damages.

18 There is a serious question of whether "waiver of tort" is an independent cause of action, or merely a remedy available only after a plaintiff has established another cause of action. All Justice Cullity found in certifying this action was that it was not plain and obvious that waiver of tort was not a cause of action. And all that the Divisional Court found on appeal was that "whether waiver of tort is an independent cause of action should be resolved in the context of a factual background of a more fully developed record." The defendants unsuccessfully sought leave to appeal certification to the Supreme Court of Canada.

19 In accordance with the certification orders of Justice Cullity of July 6, 2004 and May 25, 2007, notice of certification of the action was given to the Class. The latter order provided for a written election to opt out. No opt-out elections were received.

20 The parties exchanged affidavits of documents. The material disclosed and produced by the defendants was extensive and in electronic format. The organization and analysis of the productions commenced in late November 2007, and continued through to the examinations of discovery of representatives of the defendants which took place in September and October 2008. The examinations for discovery of the plaintiffs' representatives took place on January 13, 2009. Justice Cullity scheduled the trial of the common issues for six weeks commencing May 3, 2010. It was in the face of a trial date that the parties commenced settlement discussions and eventually reached a resolution.

21 Companion actions were brought in British Columbia and Quebec for persons residing in those provinces. These actions, to the extent possible, have been held in abeyance pending resolution of this action. An approval of the settlement will now proceed before the courts in those provinces.

THE SETTLEMENT AGREEMENT

22 The settlement has a cash value of $2.75 million and a product value of $1.25 million, totalling $4 million, all of which will be a *cy près* distribution because direct compensation to the Settlement Class is not practical.

23 While the plaintiffs and Ontario Class Counsel believe that the Class has a good case on

liability against the defendants, the amounts that are recoverable as a result of the certified cause of action, being waiver of tort, are considerably less than originally anticipated. As a result, the Class compromised and together with the British Columbia and Quebec classes, and subject to court approval in the three jurisdictions, agreed to settle the claims on the following basis:

	Item			**Amount**
1.	Diabetic monitoring Product (meters, strips, associated paraphernalia)			$1,250,000
2.	Settlement Funds			1,250,000
	(a)	Administration of CDA Compassionate Use Program	270,000	
	(b)	Public Awareness Campaign	700,000	
	(c)	Diabète	185,000	
	(d)	Fonds	15,000	
	(e)	CPF levy	80,000	
3.	Class Counsel Fees (including $24,659.50 owed to CPF)			1,500,000
Total				$4,000,000

24 The $1,250,000 value of the product component equates to 5000 kits or packages of home glucose monitors, strips and lancets, as well as instructions to be distributed by the Canadian Diabetes Association (CDA). For the Compassionate Use Program, the CDA will receive $270,000 to create and execute a Public Awareness Program. An important aspect of the distribution or product through the Compassionate Use Program is that the products will be given to those diabetics who are not yet monitoring their condition adequately or at all and it includes an educational component so that all diabetics will learn how to monitor their condition. The purpose of the Public Awareness Program will be to raise awareness of the dangers of undiagnosed and untreated diabetes. The particulars of these two programs are summarized in the paragraphs below.

Cost of Self-Management

25 The average annual cost of devices and supplies required for effective self-monitoring is nearly $1,400 for Type 1 diabetes, and $600 for Type 2 diabetes. In addition, diabetics must incur

costs for insulin and other medication, which are in some cases substantial.

26 While some individuals have certain costs covered by government health care programs or private insurance plans, this coverage is not universally available. Furthermore, levels of coverage differ from province to province, or depending on the individual's circumstances (type of diabetes, social assistance, elderly, etc.).

27 For example, in Ontario, there is no general public insurance program which covers the costs of glucose monitoring supplies for all Ontarians. Individuals who are in receipt of social assistance have the cost of meters and strips covered. Certain senior citizens or low income individuals who qualify for the Trillium Drug program, or who are insulin dependent also qualify for public coverage. However, these latter programs involve significant deductibles (e.g. 4% of household income for the Trillium program) or may require that individuals are insulin dependent (which is only a small percentage of diabetics). By way of further example, in New Brunswick only social assistance recipients who are insulin dependent have public coverage for the costs of meters and strips.

28 As a result, many persons with diabetes must incur substantial out-of-pocket expenses which are not covered by public health care or private insurance. The average annual out of pocket expense for people living with diabetes is $2,400. However, depending on the individual circumstances, it is not uncommon for out of pocket expenses to reach $10,000 per year.

29 The costs associated with self-monitoring can be a significant barrier for many Canadians. For example, 57% of Canadians with diabetes say they do not comply with their prescribed therapy due to the cost of medication, devices and supplies.

30 Focusing specifically on medically recommended testing, only 32% of Canadians are receiving the recommended regular tests. Among Canadians in the highest household income group, 42% receive all recommended tests, whereas in the lowest income group, only 21% do.

31 As a result, many Canadians living with diabetes are unable to meet their own needs for self-monitoring of blood glucose level as a result of the cost of glucose meters and test strips. This situation may be improved if Canadians are made more aware of the health dangers of diabetes and meters and strips for self-monitoring are made available to those who have difficulty affording them.

The Compassionate Use Program

32 To assist those Canadians with diabetes who are unable to afford the out of pocket costs for self-monitoring, the CDA has agreed to establish a Compassionate Use Program. The Program will make available meters and strips provided by LifeScan Canada. Any Canadian with diabetes can apply to the Program and will be asked to demonstrate that they are unable to afford required meters and strips, which are not available to them through existing government programs.

33 The Compassionate Use Program will be launched by the CDA following approval of this settlement by the courts and promoted through a media release, CDA publications, the CDA website, the CDA call centre, a national email distribution, including to all members of the CDA's diabetes education section membership (approximately 2,453) and the clinical and scientific section membership (471) and the use of distribution networks for physicians and pharmacists across Canada.

34 The communication materials and tools of the CDA are readily accessed and well used by diabetics in Canada. This year there have been approximately 1.3 million visitors to "diabetics.ca" (the CDA website). The National Contact Centre of the CDA has handled approximately 33,000 phone and email requests and the CDA has distributed approximately 2 million pieces of consumer health education literature across the country.

35 Applicants will be asked to submit an application form which will be available online at the CDA's website, or through the CDA call centre. CDA staff will review the applications in accordance with established eligibility criteria designed to complement available provincial coverage. CDA staff will contact applicants for clarification or follow up.

36 Although the CDA does not operate regional offices in Quebec, residents of Quebec could access application forms (in French or English) on-line and would be considered eligible under the Program.

37 Given that each individual will be receiving a medical device which is to be used as part of their comprehensive diabetes management plan, it is important that the individual have a good understanding of the device, its proper use, and how to interpret results received. In addition, patients frequently have ongoing issues and questions concerning proper use of their meter, and the interpretation of results, once they receive and begin to use them. They require a resource to contact to deal with their issues as they arise.

38 In order to accomplish this, all successful applicants will be referred to the call centre which is currently maintained by LifeScan to deal with customers. Call centre staff are knowledgeable about LifeScan products and trained to answer questions and counsel patients concerning the use of the products.

39 Once an applicant has been approved, that applicants' name and address only will be provided to Kelly Outsourcing and Consulting Group (Kelly OCG), which functions as LifeScan's call centre, on a fee for service basis.

40 A staff person from Kelly OCG will contact the successful applicant by phone to determine the individual's meter and strip requirements, including any special needs that may exist. Proper use of the meter will be explained along with education as to how to interpret test results. Individuals will be invited and encouraged to contact the customer service centre operated by Kelly OCG again by telephone if they require any further education or advice with respect to the proper use of their

device.

41 Thereafter, a meter, lancets and 300 strips will be shipped to each individual. The meters and strips will be shipped directly from LifeScan's shipping centre (operated by Kelly OCG) once the counselling and education has been completed.

42 It is anticipated that meters and strips can be supplied to approximately 5,000 Canadians with diabetes.

43 CDA estimates the costs to be incurred by the CDA to administer this program to be approximately $127,400 and the costs of having the product delivered by Kelly OCG, along with the appropriate patient education, to be approximately $90,500. Therefore, the total estimated costs of administering the Program are $217,940 which may increase or decrease depending on the length of time the Compassionate Use Program operates or the extent of training and support required by recipients.

44 The CDA will report to Class Counsel twice a year. Following completion of the Compassionate Use Program the CDA will deliver a final report to Class Counsel and they in turn will provide a copy to the Courts.

Public Awareness Program

45 In order to reverse the impact of the diabetes epidemic in Canada, individuals living with diabetes or pre-diabetes must have their condition promptly diagnosed. In addition, once diagnosed, Canadians need to understand that good care and effective self-management will lead to better health and better quality of life.

46 To achieve these objectives, the CDA will launch the Public Awareness Program to make Canadians more aware of the seriousness of diabetes and the importance of diagnosis and treatment.

47 The CDA has developed creative concept material which emphasizes the deadly serious nature of diabetes and encourages individuals to take action. The audience will be directed to a special micro site which will provide more detailed health information about risks and symptoms and how to get access to proper self-management. The micro site will link to, or be incorporated into, the CDA website and will also link to the websites of partners and supporters of the Public Awareness Program.

48 The CDA requires funds to produce the Public Awareness Campaign material for television, radio and web display, and buy media access for those materials. The amount in this settlement that is allocated to this Public Awareness Program will serve as a catalyst to allow the CDA to raise funds and gather support for it from other partners.

49 At the conclusion of the Public Awareness Program, CDA will report to LifeScan and Class

Counsel detailing the costs incurred to execute the Program, the coverage received and the impact as measured in terms of the number of Canadians who have accessed the micro site and patient resources which will be available there.

50 Since the Public Awareness Program will not be tailored for Quebec, $185,000 cash will be provided to Diabète Québec for its use in a public awareness program specifically aimed at Quebec residents and $15,000 will be paid to the Fonds.

SETTLEMENT APPROVAL

Legal Framework

51 Section 29(2) of the *Class Action Proceedings Act, 1992*, S.O. 1992, C. 6 ("CPA") provides that a settlement of a class proceeding is not binding unless it has been approved by the court. The test for approving a settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the class as a whole, taking into account the claims and defences in the litigation and any objections to the settlement.

52 When considering the approval of negotiated settlements, the court may consider, among other things: likelihood of recovery or likelihood of success; amount and nature of discovery, evidence or investigation; settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation and risk; recommendation of neutral parties, if any; number of objectors and nature of objections; the presence of good faith, arm's length bargaining and the absence of collusion; the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: See *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct. 22, 1998, [1998] S.C.C.A. No. 372; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72.; *Frohlinger v. Nortel Networks Corp*., [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co*., [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd*. (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

53 The court is not required to have evidence sufficient to decide the merits of the issue. This "is not required because compromise is necessary to achieve any settlement. However, the court must possess adequate information to elevate its decision above mere conjecture. This is imperative in order that the court might be satisfied that the settlement delivers adequate relief for the class in exchange for the surrender of litigation rights against the defendants": see *Ontario New Home Warranty Program v. Chevron Chemical Co*. (1999), 46 O.R. (3d) 130 at 92.

54 A settlement does not have to be perfect. It need only fall "within a zone or range of reasonableness": *Parsons v. Canadian Red Cross Society*, at para. 69; *Bilodeau v. Maple Leaf*

Foods Inc., [2009] O.J. No. 1006 (Sup. Ct.) at paras. 45-46; *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at pp. 439-440; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Sup. Ct.) at para. 8; *Ontario New Home Warranty Program v. Chevron Chemical Co*. (1999), 46 O.R. (3d) 130 (Sup. Ct.) at paras. 70 and 89.

55 The "zone of reasonableness" concept helps to guide the exercise of the court's supervisory jurisdiction over the approval of a settlement of class actions. It is not the court's responsibility to determine whether a better settlement might have been reached. Nor is it the responsibility of the court to send the parties back to the bargaining table to negotiate a settlement that is more favourable to the class. Where the parties are represented - as they are in this case - by highly reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.

56 As stated in *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at p. 440, there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by class counsel, is presented for Court approval:

> [T]he recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line.

Factors Supporting Approval

57 The settlement is a *cy près* distribution. The facts of this case support this type of settlement: the representative plaintiffs and other class members were able to use the SureStep Meters and Strips for their intended purposes, except possibly on a small number of occasions, there is no evidence of actual harm and many received replacement product.

58 Further, it is not practical to distribute the benefits in any other manner. A direct distribution to the Settlement Class would be uneconomic considering the modest damages and the fact that there is no cost effective way of locating the Settlement Class Members, determining if they suffered damage and, if so, establishing their loss. Thus, Class Counsel concluded that the Settlement Class should be compensated on a *cy près* basis with diabetic products and an educational program.

59 Given these unique points, I conclude that the proposed *cy près* distribution is appropriate. Furthermore, the *cy près* distribution is directly related to the issues in the lawsuit and will directly benefit many people who suffer from diabetes.

60 I accept that the settlement was the product of hard fought negotiations conducted by experienced counsel at arm's length. The settlement, which is quite creative, is grounded in a

principled approach to the assessment of damages and reasonably reflective of the litigation risks, costs and delays that would result from taking the matter to trial.

61 The representative plaintiffs support and recommend approval of the settlement. As well, there are no objections to the settlement.

62 This is not a case in which counsel are "guessing" about the merits of the action or value of the claim. Ontario Class Counsel had significant information from the discovery process and a good understanding of liability and damages issues before embarking on the negotiation process.

63 Given the information available to Class Counsel, they were well situated to evaluate the risks, to negotiate and ultimately to agree, subject to court approval, to the resolution of the action for the benefit of all Settlement Class Members.

64 Class Counsel had an appropriate evidentiary basis to evaluate settlement. Also, there is sufficient evidence before the court to allow it to exercise an objective, impartial and independent assessment of the fairness of the proposed settlement agreement.

65 The likelihood of recovery or success in particular leads me to conclude that the settlement is fair, reasonable and in the best interests of the class. The following analysis explains why this factor is so critical to the court's approval of the settlement.

The Likelihood of Recovery or Success

66 The fact that this action was certified with waiver of tort being the cause of action, created significant risk and challenges for the class as detailed below.

67 The defendants maintained that the SureStep System exceeded any standard that could be reasonably expected for a home monitoring device, and indeed performed better than competitive products even when the alleged problems were taken into consideration. If they were able to prove this allegation at trial, a court might well conclude that the plaintiffs were not entitled to a remedy.

68 The evidence of the defendants on the motion for certification was that the Low Flier Defect occurred between 0.5% and 1.5% of the time and the Er1 Defect occurred about 0.13% of the time, and there was no evidence of any injury in Canada arising from either defect. While there was evidence to contradict these statistics, the actual damage to the Class, if any, was probably small. Indeed, Justice Cullity found that the Class did not suffer significant damages.

69 Most importantly, does waiver of tort exist as an independent cause of action or is it only a remedy applicable to another tort? This difficult question is at the heart of this case. While Ontario Class Counsel were confident that a court would find that it was an independent cause of action, there was a considerable risk that it would not.

70 The problem with waiver of tort lies in defining the applicable parameters. Ontario Class

Counsel and the courts are in uncharted territory. Waiver of tort, as a cause of action, arose in the 16th century. In essence, it was a legal fiction which allowed a plaintiff to claim from a tortfeasor, the benefit he had earned which was beyond the damage suffered by the plaintiff. These historic antecedents had nothing to do with an action in fraud and negligence against a manufacturer of consumer health products. Pursuant to the fiction, the plaintiff would not sue in tort, but rather in "assumpsit" (later "quasi contract") for money had and received; the defendant would be holding money on a "promise" for the plaintiff. These monies are variously described as "profit", "benefit" and "windfall" which the defendant obtained by his underlying tortious conduct.

71 Even if the Class was successful in establishing waiver of tort as a cause of action, for policy reasons it might not be found applicable to products liability cases. Thus, it was possible that a court might find that the cause of action existed but was inapplicable in these circumstances.

72 Class Counsel had no way of knowing how waiver of tort would be applied until all appeals were exhausted. It was a distinct possibility that a judgment from the common issues trial judge would be appealed through to the Supreme Court of Canada.

73 The plaintiffs had, in addition to damages, claimed disgorgement of all revenues generated from the sale of the SureStep Meters, Strips and Associated Paraphernalia.

74 In *Serhan v. Johnson and Johnson*, [2004] O.J. No. 2904 at para. 73, Justice Cullity certified waiver of tort as a cause of action and the following common issues:

> (1) Are the defendants, or any of them, constructive trustees for all, or any, class members of all, or any part of, the proceeds of the sales of the SureStep Meter and Strips and any other income made by them in connection with the SureStep Meter, Strips and Associated Paraphernalia, including the lancets and controlled solutions? If so, in what amount and for whom are such proceeds held?
>
> (2) Are the defendants, or any of them, liable to account to all, or any, of the class members on a restitutionary basis for all, or any part of, the proceeds of the sales of the SureStep Meter and Strips and any other income made by them in connection with the SureStep Meter, Strips and associated paraphernalia, including the lancets and controlled solutions? If so, in what amount and for whose benefit is such accounting to be made?

75 Justice Cullity did not specify how the judge at the trial of the common issues was to make the determination of the amount to be disgorged. In particular, if the defendants were liable to disgorge, would the plaintiffs be entitled to gross revenue, or net revenue after deducting the cost of sales, or net profit after deducting the cost of sales and overhead, or a portion thereof.

76 In addition, the defendants had incurred costs for the product recall. By February 2002, they had delivered 21,321 corrected meters to some Settlement Class Members thereby replacing almost

half of the 43,902 defective meters. This was a benefit to some of the Class. It was an open question whether the defendants would be entitled to credit in whole or in part for the costs of the replacement meters. The Strips were never recalled or replaced.

77 Ontario Class Counsel were left to draw on the historic antecedents to estimate what a tortfeasor might be required to disgorge. For example, a horse worth $100 to the owner is stolen. He would sue in conversion and his damages would be $100. If the thief later resold the horse for $150, the owner's loss from the theft would not increase. An action in conversion would not reach the gain beyond the owner's loss. The courts sought a cause of action that would compel the thief to disgorge the $150 including the gain of $50.

78 The tortfeasor would be seen as a fictitious agent selling the horse for the benefit of the owner and holding the gain for the owner's benefit pursuant to "an assumpsit". The owner would sue in assumpsit (an implied promise to hold the receipts for the owner). He would not be suing in tort, thus the tort was "waived". The defendant would be compelled to disgorge the gain of $50. If there was no gain, there would be nothing to disgorge. Thus, if the tortfeasor spent $30 to sell the horse, his gain would be $20. If the tortfeasor recognized his wrong and spent $100 to replace the horse, that sum would be credited to the loss suffered by the owner. Even if the owner had not paid for the horse, he still had lost $100. Thus the tortfeasor ought not to be able to set that cost against the $20 gain. While this made contextual sense, there was no law available to guide Ontario Class Counsel on this particular point.

79 Thus, Ontario Class Counsel believed that the disgorgement claim might allow the defendants to set off all reasonable expenses incurred to earn the profits for without those expenses there would have been no gain. But the defendants would not be entitled to claim a set off for the cost of remedying their wrong doing.

80 The total gross revenue earned by the Canadian defendant during the class period from the sale of the allegedly defective SureStep Meters and Strips and the Associated Paraphernalia was $16,456,290. The total profit in Canada after deducting the costs of goods sold (i.e. what was paid for the product) and before overhead was deducted was $6,112,094. In addition, the American defendants earned a profit from the transfer pricing of these products of $1,838,926, after deducting the cost of goods sold but no overhead. Thus, the total profit earned after the cost of goods sold and before overhead was $7,951,020.

81 The defendants asserted that they are entitled to a credit in the amount of $5,157,287 for a proportionate share of their overhead in Canada. Since the pith of the claim is the disgorgement of gain, it is Ontario Class Counsel's view that a court might allow some deduction for overhead as the overhead was incurred, at least in part, to earn the gain. If so, a court could reasonably reduce the overhead for example by 25% to $3,867,965.

82 In addition, the defendants assert that they are entitled to credit for $3,633,037 as the cost of the product recall.

83 So, ultimately, at a trial of the common issues, the defendants would claim that they had lost money and so there would be nothing to disgorge. Indeed, they calculate their loss at $1,337,143.

84 Ontario Class Counsel believe that realistically the amount to be disgorged could be calculated in one of three ways as follows:

1.	$16,456,290	Revenue
2.	$6,112,094	Gross profit after cost of goods sold
$3,867,965		Less overhead (post 25% reduction)
$1,838,917		Plus transfer price profit
$4,083,046		Total profit to be disgorged
3.	$6,112,094	Gross profit after cost of goods sold
$5,157,287		Less overhead (no reduction)
$1,838,917		Plus transfer price profit
$2,793,724		Total profit to be disgorged

85 However, there was real risk that these alternative damage calculations would not succeed because of the following compelling points that the defendants raise. First is the fact that the representative plaintiffs and other class members were able to use the SureStep Meters and Strips for their intended purposes, except possibly on a small number of occasions. Secondly, there is no evidence that any Class member suffered actual harm from the use of SureStep Meters and Strips. In these circumstances, a court might conclude that it is unjust to allow the Class to receive any disgorgement of profits, which would in essence be a windfall without any juristic basis.

86 The claim also includes punitive damages. In the circumstances of this case, if the plaintiffs succeeded in proving that the defendants knowingly put defective medical devices on the market, a

court might find that punitive damages are warranted; particularly, as the compensatory damages are modest. On the other hand, the claim here is for disgorgement. There is doubt as to whether in such circumstances a court would order both disgorgement and punitive damages, as disgorgement may itself be seen as punitive. Lastly, the defendants deny that the products are defective and specifically deny that they knowingly sold any defective product. If the defendants' position succeeded at trial there would be no basis for an award of punitive damages.

APPROVAL OF CLASS COUNSEL FEES

87 Class Counsel requests a fixed fee of $1.5 million inclusive of disbursements, taxes and repayment of $24,659.50 owed for disbursements advanced by the Class Proceedings Fund (CPF).

88 It is proposed that the fixed fee will be distributed as follows:

(1) $24,659.50 to the CPF
(2) $30,000 inclusive of fees, disbursements and taxes to Siskinds Desmeules, which is subject to approval of the Quebec Court; and
(3) $1,445,340.50 inclusive of fees, disbursements and taxes to Ontario Class Counsel and British Columbia Class Counsel, subject to the approval of the British Columbia Court.

89 The court's task is to determine a fee that is "fair and reasonable" in all of the circumstances: *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (Sup. Ct.) at paras. 13 and 56.

90 In *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd*., [2005] O.J. No. 1117 (Sup. Ct.) at para. 67, Cumming J. summarized some of the factors to be considered by the court when fixing class counsel's fees:

(a) the factual and legal complexities of the matters dealt with;
(b) the risk undertaken, including the risk that the matter might not be certified;
(c) the degree of responsibility assumed by class counsel;
(d) the monetary value of the matters in issue;
(e) the importance of the matter to the class;
(f) the degree of skill and competence demonstrated by class counsel;
(g) the results achieved;
(h) the ability of the class to pay;
(i) the expectations of the class as to the amount of fees; and
(j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

91 With these factors in mind, the following review confirms the reasonableness of the proposed fixed fee.

92 Class Counsel included skilled lawyers who are experts in the field of class action litigation. Harvey Strosberg and Patricia Speight of Sutts, Strosberg LLP have been involved in the litigation from the outset, as has Kirk Baert with the support of other lawyers at his firm, Koskie Minsky LLP. Paul Pape joined the team prior to the argument of the motion for certification and he handled the negotiations that led to the proposed settlement of the action. This team invested considerable time to navigate through the unchartered waters of waiver of tort and achieve the settlement this court has approved.

93 The plaintiffs and Ontario Class Counsel agreed to a contingency fee of the greater of 25% of the total recovery or a base fee times a multiplier of three, plus taxes, plus disbursements, plus costs as set out in paragraph 4 of the Fee Agreement:

> In addition to any fees and disbursements recovered as party and party costs paid to the SOLICITOR pursuant to the provisions of paragraph 3 above, in the event of Success in the Action the CLIENTS agree that the SOLICITOR shall be paid and shall receive the aggregate of the following:
>
> (a) to the extent that any disbursements are not received and recovered as party and party costs, an amount equivalent to the cost of the unrecovered disbursements plus applicable taxes; and
> (b) the greater of:
>
> (1) 25% of the settlement funds or monetary award, plus applicable taxes; or
> (2) the base fee, being the number of hours times the usual hourly rates, increased by a multiplier of 3.0, plus applicable taxes.

94 Class Counsel seek a fixed fee of $1.5 million, inclusive of disbursements, taxes and repayment of the amount owed for disbursements advanced by the CPF. This request results in a fee that is considerably less than the time docketed and demonstrates the reasonableness of the fixed fee.

95 There were significant risks undertaken in this case. There was the risk that the action would not be certified as a class proceeding or that the certification would be reversed on appeal. As well, there was the risk that the Class would be unsuccessful at the trial of the common issues on liability and/or quantum of recovery.

96 Ontario Class Counsel had complete responsibility for the prosecution of the action. They were successful in certifying the action. They engaged in adversarial negotiations and negotiated the settlement this court has approved.

97 The Class Counsel team demonstrated significant skill and competence. They did the necessary research and preparation so that they were able to negotiate a resolution of this action. They were successful in obtaining a creative and beneficial *cy près* distribution in circumstances where direct compensation to the Settlement Class is not practical.

98 Class Counsel do not believe that any individual actions were commenced. They believe that this was because the cost of prosecution of an individual action would have exceeded the claimant's losses. As a result, but for the commencement of this action, it is likely that there would be no recovery.

99 Lastly, the Ontario Class was advised in the notice of the approval hearing that the legal fees (all inclusive) requested for Class Counsel would be $1.5 million. There were no objections to the amount sought and the representative plaintiffs support Class Counsel's fee request.

100 For all of the above reasons, I approve the fee as requested.

CONCLUSION

101 I make the following orders:

1. The settlement is approved.
2. I approve and fix Class Counsel's fee at $1.5 million inclusive of disbursements, taxes and repayment to the CPF, allocated as follows:

   (a) $24,659.50 to the CPF
   (b) $30,000 inclusive of fees, disbursements and taxes to Siskinds Desmeules, which is subject to approval of the Quebec Court; and
   (c) $1,445,340.50 inclusive of fees, disbursements and taxes to Ontario Class Counsel and British Columbia Class Counsel, subject to the approval of the British Columbia Court.

C.J. HORKINS J.