DAMAGES AND OTHER MONETARY AWARDS IN CLASS PROCEEDINGS

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LSUC Conference March 27, 2012 on *The Law of Damages*

INTRODUCTION

Although theories of liability such as the government's negligence, a bank's breach of contract or an insurance company's bad faith usually get the legal headlines, sometimes the theory of damages will be the most important issue in a class action for at least four related reasons.

First, the strategy by which damages are pursued by class counsel may determine whether that particular law firm gets carriage of the action in the event different firms commence competitive claims and a "carriage fight" ensues.

Secondly, the type of damages claimed (e.g., common law, equitable, restitutionary, punitive or aggravated) will, in some cases, determine whether the action can even be certified as a class proceeding.

Thirdly, the evidence by which damages are to be proven may also determine whether the action can be certified.

Fourthly, there is the obvious point that a class action with small damages may not be worth pursuing given the high costs associated with prosecuting these procedurally complicated and usually hard fought claims.

This paper will discuss the significance of the type of damages which are most often claimed in class actions, as well as the related evidentiary issues. To date these have been discussed primarily in the context of certification motions rather than trials, although that should change in the next few years as common issues trials become more prevalent.

These issues, together with the unique class action doctrine of the *cy-près* distribution of damages, will be discussed below, after a brief overview of the statutory basis for class proceedings.

STATUTORY BACKGROUND

For a claim to be certified as a class proceeding the proposed class must satisfy the criteria in s. 5 of the Class Proceedings Act (the Act). [1] In summary, the plaintiffs must establish that the statement of claim discloses a cause of action, there is an identifiable class of two or more

persons, there are common issues, the class proceeding is the preferable procedure for pursuing the claims and there is an appropriate representative plaintiff who has put forward a viable litigation plan. [2]

The Act expressly provides that certification should not be denied simply because there is a claim for damages that requires individual assessment after determination of the common issues [3] or that different remedies are sought for different class members. [4]

Discovery is generally limited, on the plaintiff's side, to the representative plaintiff [5] but the defendants may seek leave to examine other class members. [6] One of the factors the court must consider in determining whether to order examinations of other class members is the approximate monetary value of any individual claims. [7]

In a class action the plaintiffs' lawyers will often try to avoid an individual assessment of damages because too many individual issues will unduly complicate the proceeding. The greater the number of individual issues and the greater their complexity, the higher the risk of a court refusing to certify a claim because the individual issues overwhelm whatever common issues may exist. Thus, the possibility of establishing "aggregate" damages and determining damages without recourse to the records or circumstances of individual class members is highly desirable.

The Ontario Law Reform Commission, in its 1982 report on class actions [8] recommended statutory provisions to facilitate the assessment of aggregate damages. These were incorporated in ss. 24-26 of the Act. It can reasonably be said that these sections have significantly changed the law of damages and in this respect the Act is far more than procedural in scope.

S. 24 provides for "aggregate assessment of monetary relief" and s. 23 permits the court to rely on statistical information that would not otherwise be admissible to determine issues relating to the amount or distribution of a monetary award. S. 25 allows the court, after determining common issues and having decided that individual issues must now be resolved, to then determine those issues or pass them to another judge or appoint a referee. The parties may also agree on an alternate procedure to resolve the individual issues. In establishing a procedure for dealing with individual issues the court may dispense with procedural steps it considers unnecessary and may authorize specialized procedural steps, including "appropriate" rules relating to admission of evidence and means of proof. [9]

Finally, s. 26 directs the court on how to distribute to class members amounts awarded under ss. 24 or 25. S. 26(4) even contemplates the cy-près award of damages which have not been distributed within the time set by the court. In this case the court may order that any residual compensation be paid to charities or in other ways that may reasonably be expected to benefit class members. The court can also order monetary awards be paid by third parties who would otherwise have to pay the defendant [10] and that monetary awards be paid in installments. [11]

GENERAL PRINCIPLES OF CERTIFICATION

Before discussing specific aspects of monetary awards under the Act, it is important to appreciate some basic principles of certification under the Act. The leading Court of Appeal

decision is Cloud v. Canada (Attorney General) (Cloud). [12] The court confirmed that the claims of the class members must raise common issues which will avoid duplication of fact finding or legal analysis. The court described this requirement as a "low bar". [13] It is important to appreciate that the common issues do not need to resolve the dispute. Even after the trial of the common issues there may be many aspects of liability or damages which remain to be determined on an individual basis. Nonetheless, common issues may be certified for trial and a class action may still be the preferable procedure for dealing with the dispute. [14]

Cloud involved claims by some 1,400 former students at a residential school in respect of alleged breaches of fiduciary duty, negligence, assault, battery, breach of aboriginal and treaty rights, some of which occurred over an extended period from 1922 to 1969. Once the Family Law Act claims were included the number of people in the class was estimated to be 4,200. The motion for certification was dismissed by the lower courts. It was only at the Court of Appeal that the common issues were certified.

The Court of Appeal in Cloud approved the dissenting reasons of Justice Cullity in Divisional Court and certified the action, even though the plaintiffs acknowledged that they would have to establish causation of harm and quantification of damages on an individual basis for three different classes. [15] While damages in this case generally needed to be proved on an individual basis, the court also held that it was possible that the common issues trial judge might assess aggregate damages in respect of the novel claim for the loss of aboriginal rights. Thus, it was conceivable that damages could be assessed globally and each student could be entitled to an amount that could be determined without regard to their individual circumstances. The Court of Appeal certified the issue and left the trial judge to consider the viability of an aggregate assessment of damages.

The court held that the common issues were fundamental to the action and were certainly not as negligible in relation to the individual issues. [16] The court relied on the great flexibility provided by the Act and stated that:

"For example, s. 10 allows for decertification if, as the action unfolds, it appears that the requirements of s. 5(1) cease to be met. In addition, s. 25 contemplates a variety of ways in which individual issues may be determined following the common issues trial other than by the presiding trial judge. Thus at this stage in the proceedings, when one views the common issues trial in the context of the action as whole, there is no reason to doubt the conclusion that the class action is a manageable method of advancing the claim." [17]

In conclusion, although damages may be calculated on a class-wide basis in appropriate cases, a claim will often still be certified even if the damages must be assessed individual by individual.

From the plaintiff's perspective it is, however, preferable to assess the damages on an aggregate basis because:

(a) it allows the monetary award to be calculated on a more cost effective basis; and

(b) it provides an additional common issue which enhances the prospects for a class proceeding to be found to be the preferable procedure, as required by s. 5(1)(d).

CARRIAGE FIGHTS

As noted in the introduction, the plaintiffs' strategy with respect to damages can be relevant to a carriage fight in which different law firms compete to act for the plaintiff class. The case management judge must determine which claim and which firm should advance and which claims are stayed. How the claim for damages is framed may well determine which plaintiff's law firm obtains carriage of a proposed class action in the event there are competing actions. If one firm's theory of damages is too complicated or possibly untenable, that firm's claim will not likely be the action preferred by the judge determining the carriage motion. [18]

DAMAGES AND OTHER MONETARY AWARDS: HOW TO PROVE THEM AND HOW TO DISTRIBUTE THEM

It is vital in a class action for plaintiff's counsel to analyze and completely understand their theory of damages or monetary award at the outset. The theory will, of course, ultimately determine the amount of compensation. At the outset, however, plaintiff's counsel must also consider in detail the type and source of evidence required to prove the damages or other monetary award. This will determine whether damages can be tried as a common issue or as an individual claim after the common issues have been determined.

The basic damages' theory behind various claims is summarized below, followed by a review of their application in some recent class actions by way of illustration. These issues have to date mostly been considered in certification motions rather than at trial or an appeal on the merits because common issues trials are still far from common in Ontario:

(a) breach of contract: the measure of damages is the loss which reasonably flows from the breach of the contract or which was contemplated by the parties at the time the contract was formed;

(b) tortious claims: the measure of damages is the amount of money required to put the plaintiffs back in the position they would have been in but for the tortious activity;

(c) restitutionary claims: the compensation will be based on the disgorgement of profits or revenues earned by the defendant as a result of the wrongful conduct;

(d) statutory claims: the measure of damages will be determined by the express statutory provisions. (Certain statutory claims are common in the context of class actions see, e.g., the Securities Act, ss. 130 and 138.8, the Consumer Protection Act, *2000*, S.O. 2000, c. 41, ss. 17 and18 and the Competition Act, R.S.C. 1985 c. C-34, ss. 36 and 52 and others to a much lesser extent, e.g., the Employment Standards Act, ss. 56 and 63.)

(a) Breach of Contract

(i) Cassano

The distinctive issues with contractual damages claimed in a class action are readily demonstrated by reference to the leading case of Cassano v. Toronto-Dominion Bank. [19] The plaintiff class originally claimed damages based on breach of contract (although the actual words "breach of contract" did not appear in the pleading) and restitution based on unjust enrichment. [20] The defendant credit card company was alleged to have improperly manipulated exchange rates on charges to the bills of the plaintiff class. Both the motions judge and the Divisional Court denied certification, primarily on the basis that the damages' assessment would require an individual assessment of each cardholder's behaviour.

The Court of Appeal discussed the distinction between compensatory damages and restitutionary damages for breach of contract. [21] Restitutionary damages, i.e., the disgorgement of the defendants' gain, may be awarded where the plaintiff has suffered no loss or the plaintiff's loss is less than the defendants' gain. [22] Thus, restitution or disgorgement of profits may not be available unless compensatory damages are inadequate, even when the claim is based in contract. Indeed, plaintiffs' counsel in *Cassano* conceded that the plaintiffs were not seeking restitutionary damages because in this case compensatory damages were not inadequate. It remains to be seen whether damages can be calculated on the basis of disgorgement of profits or revenues where compensatory damages might be adequate but are more difficult or too difficult to prove. [23]

By the time of the certification motion in Cassano the plaintiffs did not seek an accounting of profits or restitution damages but were instead relying on a claim for breach of contract. [24] Nonetheless, it should be remembered that the lower courts had rejected this issue on the basis that one would have to look at how each cardholder would have reacted if told that TD intended to impose the extra, undisclosed charges.

The seven common issues proposed by the plaintiffs in the Court of Appeal were:

"Issue 1 - Did TD charge its cardholders an unauthorized fee or fees when converting the debits and credits incurred in a foreign currency to Canadian dollars? If so, when, why and what are the particulars?

Issue 2 - If the answer to Question 1 is "Yes", must TD account for the unauthorized fees? If so, why and to whom?

Issue 3 - Is TD liable in damages? If so, why and to whom?

Issue 4 - Should the damages for the class be assessed in the aggregate? If so, why, in what amount and how should the damages be distributed?

Issue 5 - Is TD liable to pay punitive damages? If so, why and to whom? Should the punitive damages be assessed in the aggregate? If so, why, in what amount and how should the punitive damages be distributed?

Issue 6 - Should TD pay prejudgment and postjudgment interest? If so, should interest be simple [or] compound, at what rate(s), on what amount(s) and why and how should the interest be distributed?

Issue 7 - Should TD pay the costs of administering and distributing any monetary judgment? If so, why and what amount should TD pay?" [25]

The Court of Appeal determined that the liability of issues 1-3 did not require a review of how each individual would have responded to disclosure of the charges. This issue is not within the scope of this paper. [26] The main question for present purposes is the viability of issue 4 (aggregate assessment). This turned, in particular, on whether the plaintiffs could rely on s. 24(1) of the Act which provides:

24(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. [27]

The lower courts had found that s. 24(1)(c) could not be satisfied, again because it would require proof of how each class member would have used their Visa card if they had known improper fees were being applied by the bank. The lower courts had also held that such an individual analysis would render the common issues meaningless and meant that a class action was not a preferable procedure.

(ii) Findings of the Court of Appeal re s. 24(1)

The Court of Appeal set aside the lower courts' decisions and certified issue 4, applying its then recent decision in Markson v. MBNA Canada Bank. [28] The court considered each of s. 24′s subsections (a)-(c).

The court concluded that s. 24(1)(a) of the Act (i.e., monetary relief was claimed on behalf of some or all class members) was clearly satisfied. Monetary relief had been claimed.

The court also concluded that there was a "reasonable likelihood" that s. 24(c) was satisfied, i.e., that the aggregate or part of the defendants' liability to some or all class members could reasonably be determined without proof by individual class members. The Court of Appeal, unlike the lower courts, concluded that individual inquiries were not necessary. The trial judge would not have to determine what cardholders would have done if they had known of the fees. TD's liability turned on whether it had charged unauthorized fees having regard to the contracts.

It did not matter what cardholders would have done if TD had not breached its contracts with cardholders. Once this conclusion was drawn the court held that one could reasonably expect that TD's aggregate liability could be proven from TD's own records of the fees it had collected in the relevant time frame. [29]

It is implicit from the court's reasons that the evidentiary burden of proof had shifted to the defendant because the court expressly noted the defendant had not provided any evidence that the aggregate liability could not be assessed without proof by individual class members as required by s. 24.1(c). [30]

The Court of Appeal then considered s. 24(1)(b), i.e., that no question of fact or law, other than those relating to the assessment of monetary relief, remained to be determined in order to establish the amount of the defendants' monetary liability.

The court reiterated Rosenberg J.A.'s conclusion in Markson that this subsection is satisfied:

"Where **potential** liability can be established on a class wide basis but entitlement to monetary relief may depend on individual assessments." [31] (emphasis added)

The Court of Appeal held that if the trial judge was to find that TD had breached its contract when it charged the fees, then liability would have been established and this subsection would be satisfied because there would be "no questions of fact or law other than those relating to the assessment of monetary relief" outstanding.

TD had argued that the cost to calculate the fees it had taken by reviewing its individual records would be prohibitive. The Court of Appeal readily concluded, however, that it would not be sound policy to allow a defendant to retain a gain arising from its breach of contract simply because its costs of calculating the amount of the gain were substantial. [32]

(iii) Distributing Damages to Class Members

Ss. 24(2) and (3) provide that individual class members may share in an award on an average or proportional basis even where it is impractical or inefficient to identify the class members or their exact shares. [33] The Court of Appeal in Cassano relied on the combined operation of ss. 24(4), (5) and (6) which provide:

Court to determine whether individual claims need to be made

24.(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

(a) the use of standardized proof of claim forms;

(b) the receipt of affidavit or other documentary evidence; and

(c) the auditing of claims on a sampling or other basis.

The Court of Appeal concluded that these mechanisms could be used to deal with individual claims in respect of aggregate damages, irrespective of whether the assessment of damages turned on documentary or testimonial evidence. [34]

In the court's discussion of "preferable procedure" the Chief Justice did, however, contemplate the possibility that the common issues judge might determine that it was not appropriate to award aggregate damages after all. Even if this was to transpire, the Court of Appeal concluded that a class action was preferable, relying on the Act's procedures for conducting individual assessments of damages as a basis for this decision. [35] The Chief Justice concluded:

"Although the prospect of an aggregate assessment of damages is a factor in favour of certification it is not a prerequisite. An action may well be certified as a class proceeding even in cases where individual assessments of damages in small amounts may be necessary. Absent this possibility the purposes of the CPA would be seriously eroded." [36]

The Court of Appeal contemplated that after the liability issue had been determined (did the bank breach the contracts?) then all that would remain would be a "relatively straightforward accounting exercise" in which each class member would provide their credit card statements or the defendant would produce records to show the amount of improper charges and the individuals involved. [37]

The Chief Justice relied also on s. 26(3) which states:

"In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant."

(iv) Markson

The Cassano appeal decision was not unexpected in light of its slightly earlier decision in Markson v. MBNA Canada Bank, supra. Markson involved the allegation that the defendant had received interest on cash advances at a criminal interest rate in breach of s. 347(1)(b) of the Criminal Code. Whether this allegation could be substantiated depended on whether a cardholder had acted in a particular way in respect of borrowing and repayment, i.e., only some cardholders who had taken cash advances of a certain amount and repaid them within a certain time (which

varied depending on other aspects of the transaction) could establish they had been charged a criminal rate of interest.

Again, the motion for certification was denied both at first instance and in Divisional Court on the basis that the plaintiffs' claims for restitution and breach of contract did not raise common issues and that the class proceeding was not a preferable procedure for determining these issues. The lower courts concluded that it would be necessary to examine million of transactions to determine to whom the bank was liable, if to anyone.

The Court of Appeal, however, allowed the appeal and certified the case relying on ss. 23 and 24 of the Act, noting that these sections had not been argued in the lower courts. These sections provided a solution for the plaintiffs (even though, unlike Cassano, the question of liability could not be determined across the board for all members of the Class as one common issue).

The defendant argued that the plaintiff could not rely on s. 24 to establish liability. It relied on the Court of Appeal's 2003 decision in Chadha v. Bayer. [38] The defendant also filed evidence that its database was inadequate to determine how much money it had improperly charged. Finally, the defendant relied on the high costs which would be involved in reviewing the bank's records to try to determine the alleged criminal interest rate.

The plaintiff had initially argued in the lower courts that it may be possible to design a computer program to identify who actually had paid a criminal rate. On appeal the plaintiffs, for the first time, relied on s. 23 (sampling and statistics) combined with s. 24 (aggregate damages). The Court of Appeal found for the plaintiffs, certified the claims and rejected the defendant's arguments.

One of the most important points for certification purposes is that the plaintiffs need only establish that there is a "reasonable likelihood" that the preconditions in s. 24(1) can be satisfied at trial. [39] On the question of liability, the court found that the declaration and injunctive relief sought here would establish that the defendant had received interest calculated at a criminal rate. [40] This declaration, if granted, would mean that liability had been established. As far as the court was concerned this was entirely consistent with Chadha. [41]

The court confirmed that if it was established that the defendant administered its cash advances contrary to s. 347 of the Criminal Code or breached its contract with its customers the plaintiffs would have "established potential liability on a class-wide basis". [42] Ss. 23 and 24 would be then used to calculate the global damages and to distribute the aggregate sums to class members. [43]

The court noted in respect of s. 24(1)(c) (the requirement that the aggregate or a part of the defendants' liability to some or all class members can reasonably be determined without proof by individual class members) that the plaintiff class could rely on statistical sampling, permitted by s. 23, to determine the aggregate or part of the defendants' liability without proof of individual claims. Thus, s. 24(1)(c) was satisfied.

The relevant common issues that were certified concerning damages, therefore, were:

(a) If MBNA received interest in excess of an effective annual rate of 60% on cash advances made under agreements or arrangements with class members is MBNA required to repay to the class as restitution the transaction fees it received from the class or, alternatively, the interest that it has received from the class that exceeds an effective annual rate of 60% interest?

(b) Can the amount of restitution and damages for breach of contract be determined on an aggregate basis? If so, in what amount? [44]

(v) Other Individual Issues

Even where damages for breach of contract can be assessed in aggregate by reviewing the defendants' records, i.e., without recourse to individual's own records, defendants may still argue that individual circumstances need to be considered. In Hague v. Liberty Mutual Insurance Company [45] the plaintiffs claimed compensation for breach by the insurer of the motor vehicle insurance policy. After a car accident the insurer was required by the policy to pay compensation based on the value of parts which were of like kind and quality to the original equipment manufacturer automobile parts. The plaintiff's claim was that compensation was improperly based on the price of cheaper, inferior parts.

The court accepted that the defendants' records provided all the details necessary for this calculation of contractual damages. The defendants argued that, even if that was true, some policyholders had had more expensive OEM parts installed on the vehicle by the garages which did the repairs or that the car part damaged in the accident had not been an original part. Thus, they argued one still had to look at every individual car.

The case was certified, however, and these issues were held to be matters for the defence to raise after the aggregate assessment of damages, if still relevant. These issues could be argued at the time of the proposed distribution to individual class members, at which time the insurer could establish that the damaged part had in fact been a non-OEM part or that the class member had not otherwise suffered a loss. [46]

(b) Tort Claims

(i) Negligence

The Ontario courts have recently grappled with claims by bank employees for unpaid overtime based on negligence by the employer. In Fulawka v. Bank of Nova Scotia the proposed claim was certified by Strathy J. [47] whose decision as affirmed by Divisional Court. [48] The common issues focused on the bank's alleged negligence in failing to have a proper record keeping system and whether the bank breached a duty to protect employees from working unpaid overtime.

One serious obstacle to certification was the difficulty of assessing damages at a common issues trial. An employee might be unable to prove the number of overtime hours worked because the bank had failed to record the hours. Justice Strathy held that:

"If the common issues judge finds that Scotiabank failed to have a proper record keeping system and the absence of such records impairs the ability of class members to prove their damages, an aggregate assessment of damages using statistical means may well be the only way to fairly compensate class members. Although class members may be compensated more or less than they are owed by the defendant this is not a bar to certification." [49]

The common issue concerning damages which was certified was:

" 10. If the answer to any of common issues is "yes", is Scotiabank potentially liable on a class-wide basis? If "yes":

a. Can damages be assessed on an aggregate basis? If "yes":

i. Can aggregate damages be assessed in whole or part on the basis of statistical evidence, including statistical evidence based on random sampling?

ii. What is the quantum of aggregate damages owed to Class Members?

iii. What is the appropriate method or procedure for distributing the aggregate damages award to Class Members?" [50]

To support the certification of such a common issue it may be necessary to lead expert evidence with respect to the statistical and sampling methods to be used at trial. In Fulawka the court accepted that the affidavit filed by a statistical expert provided the required basis in fact to show that an aggregate assessment and an appropriate method of distribution could be determined by the common issues judge. [51]

Strathy J. also stated that even if individual assessments of damages were required they would not be overly complex, as evidenced by the fact that ScotiaBank had already designed a compensation scheme for a smaller group of 600 overtime claims. [52]

The Divisional Court affirmed Justice Strathy's decision. The court applied the Court of Appeal's direction in Markson that potential liability must be established before an aggregate assessment is permitted and accepted that the concept of "potential liability" did not relieve the plaintiff from having to prove causation at the common issues trial. [53] The Divisional Court, however, agreed with Strathy J. that "potential liability" would exist:

"On a showing that ScotiaBank exposed all class members to a direct risk of harm and at least some of them suffered harm as a result." [54]

Thus, it will be sufficient for the plaintiff class at the common issues trial to establish that the bank, though a class wide negligent omission or oversight permitted overtime work in retail branches and that at least some class members were not paid for their work. Furthermore, apart from the potential liability in negligence, the class members might establish at the common issues trial breaches of their contracts of employment (through systemic breaches of contract) or indeed that the bank had been unjustly enriched. The court stated that for the breach of contract

and unjust enrichment claims, actual and not just potential liability would have been established because the causes of action in contract and unjust enrichment, as opposed to that in negligence, did not require proof of actual consequential damages as part of the liability question. [55]

In Cannon v. Funds for Canada Foundation [56] (Cannon), the plaintiffs sought to certify common issues based on claims that a tax shelter involving charitable donations (which were supposed to give rise to substantial tax deductions but which were ultimately denied by Canada Revenue Agency), was negligently or fraudulently conceived. The claim included related claims for conspiracy, waiver of tort, breach of contract, unjust enrichment and breach of the Consumer Protection Act, 2002. The plaintiffs proposed a common issue concerning damages as follows:

"(l) Are the Class Members entitled to damages and prejudgment interest, including:

(i) The amount of their cash donations?

(ii) The fair market value of any in kind donations?

(iii) The interest and/or penalties payable to the Canada Revenue Agency ('C.R.A.') in respect of their tax reassessments?

(iv) Their out of pocket expenses incurred in responding to the C.R.A. tax reassessments?" [57]

Although the certification motion succeeded the court refused to certify this issue without much discussion. [58]

The argument that the cash donations of all class members could simply be aggregated was rejected because the defendant lawyers presented expert evidence suggesting that individual members would have to offset benefits they had obtained from the initial tax credit and also that individuals would have to take into account any settlements with CRA. The court did not, however, reject outright the possibility of an aggregate assessment. Justice Strathy said simply he would leave this issue to the common issues judge. [59]

(ii) Medical Monitoring and Other Special Damages

Class actions in respect of defective pharmaceuticals or medical products often involve negligence claims. [60] One unusual aspect of such a negligence claim that is often advanced in a class action is a claim for a medical monitoring program and the costs associated therewith. In Heward v. Eli Lilly Justice Cullity approved the following common issues:

"4. Are class members entitled to special damages for medical costs incurred in the screening, diagnosis and treatment of diseases related to Zyprexa?

5. Should the defendants be required to implement a medical monitoring regime and if so what should that regime comprise and how should it be established?" [61]

The court noted that the other issues (with respect to negligence and general causation) would have to be established first, to be followed by individual issues of specific causation and damages. The court concluded that common issue 4 could be decided conditionally for and limited to those members of the class who were able to subsequently establish valid claims. [62]

The court found that the proposed medical monitoring regime could certainly be determined at the common issues trial. The court also contemplated the need to distinguish between class members who have not yet suffered damages-who may not require medical monitoring-and those who have suffered damages, in which case a separate regime may need to be established. [63]

(iii) Other Individual Issues in Negligence Claims

In a personal injury case the upper limit for an individual's damages for pain and suffering is set at about $320,000.00 by the Supreme Court of Canada. No case has yet discussed how claims for pain and suffering in a class action might be aggregated, although Justice Goudge, in Cloud, having noted that the appellants (plaintiffs) had conceded that quantification of damages would be done separately for each individual class member, stated:

"I also agree with Cullity J. that in a trial of these common issues [systemic negligence in a residential school] the claims for an aggregate assessment of damages and punitive damages are properly included as common issues. The trial judge should be able to make an aggregate assessment of the damages suffered by all class members due to the breaches found, if this can reasonably be done without proof of loss by each individual members. Indeed, this is consistent with s. 24 of the CPA." [64]

This comment, however, likely relates only to the claim for breach of aboriginal rights.

Attempts have been made to claim class-wide damages for mental distress as a result of physical injury or nervous shock. It seems clear, however, that these may only be claimed where they can be connected to physical injury or recognizable psychiatric injury and appear to be assessable only on an individual basis. [65] Thus, in Healey the court refused to allow a cause of action for harm which fell short of a recognizable psychiatric illness. One part of the claim involved plaintiffs who had been improperly exposed to patients with tuberculosis and who claimed for psychological harm, even though they themselves had not been infected.

The plaintiffs' relied on an expert opinion that some 30-40% of individuals who were unaffected would still experience psychological injury or illness, some of whom would have a recognized psychiatric illness. The Court of Appeal rejected the claim on the basis of a lack of duty of care but also held that the assessment of damages in each case would be idiosyncratic. [66] The court distinguished Anderson v. Wilson [67] on the basis that the Court of Appeal there had considered primarily the test for certification rather than the issue of aggregate damages. Indeed, the Court of Appeal in Anderson had made no reference to the claim for psychological injury as one which was potentially susceptible to being dealt with an on aggregate basis.

It is worth noting, however, that in Anderson the Court of Appeal had stated:

"There are many persons with the same complaint each of which would typically represent a modest claim that would not itself justify an independent action. In addition, the nature of the overall claim lends itself to aggregate treatment because individual reactions to the notices would likely be similar in each case-fear of a serious infection and anxiety during the waiting period for a test result. If evidence from patients to support such reactions to the notices is necessary it would probably suffice to hear from a few typical claimants. The balance of the evidence as to liability would relate to the conduct of the clinics, the reaction of the public health authorities and foreseeability issues." [68]

(iv) Claim for Several Liability: To Avoid Third Party Claims for Contribution and Indemnity

As can be seen in cases like *Cloud* and *Rumley*, class actions in negligence have been advanced against residential and similar schools. A tactic sometimes adopted by defendants in such claims is to make a third party claim for contribution and indemnity based on the negligence of others who have not been joined in the original lawsuit. In a recent case, *Johnston v. The Sheila Morrison Schools*, [69] the Divisional Court set aside the lower court order which had permitted the respondent school to claim contribution and indemnity against parents and guardians of the students. The allegation was that the parents knew and approved of the formal discipline system in the schools. The plaintiffs confirmed, however, that they intended only to pursue the "several" claims against the school and headmaster and to claim damages based only on their proportionate negligence. Thus, where the plaintiff was only seeking the portion of damages attributable to that particular defendant there was no need for any third party claim. [70]

(v) Nuisance and Rylands v. Fletcher

The measure of damages in claims for nuisance and *Rylands v. Fletcher* was recently considered by the Court of Appeal in *Smith v. Inco Ltd.* [71] Some 7,000 residential homeowners in Port Colborne originally claimed for personal injury as well as for property damages based on Inco's contamination of their properties by virtue of nickel emissions over a period of many years.

The initial certification motion was rejected in part because the claims for personal injuries would have required individual assessment and in the circumstances the common issues did not sufficiently advance the action. [72]

In 2005 the Court of Appeal ultimately certified a much more restricted claim which focused on the devaluation of the properties in a specific area. The personal injury claims were abandoned. [73]

The claim proceeded to trial in 2010. The trial judge granted judgment to the plaintiffs on the common issues and awarded $36,000,000.00 to the class based on nuisance and strict liability (*Rylands v. Fletcher*) for the negative effect of the nickel emissions on property values.

The Court of Appeal reversed the trial decision. In respect of damages, the Court of Appeal criticized the trial judge's interpretation of the expert evidence and concluded that the plaintiff class had not proven any damages. [74]

The plaintiff had relied on expert evidence comparing local property values with those in the neighbouring City of Welland. The experts on both sides agreed it was reasonable to use Welland as the comparator and the parties relied on data from Teranet, the Multiple Listing Service and the Municipal Property Assessment Corporation.

The Court of Appeal found Teranet's information to be "hopelessly flawed" [75] and should not have been used by the trial judge to bolster any conclusion. The Court of Appeal did, however, analyze the other data sets carefully, but found that these failed to establish any loss on the part of the plaintiff class. Thus, the plaintiffs' approach to class wide damages was accepted, but upon careful analysis the data did not establish that the plaintiffs had suffered any loss.

(c) Restitutionary Claims

(i) Waiver of Tort, Unjust Enrichment and Restitution Generally

Damages may not always be readily calculated because the necessary records may not be available. While this will not usually preclude a remedy to the plaintiff class where the defendants' fault has contributed to the inability to provide the necessary records, there may be circumstances where the defendants are not the source of the difficulty in assessing damages. In this case the plaintiffs may have to look to alternative grounds for liability and compensation in the form of monetary awards other than the conventional damages associated with tort and contract claims. Alternatively, the profits or the revenues earned by the defendants may be more substantial than the damages suffered by the plaintiffs. Another possibility is that the defendants' revenues or profits may simply be more readily proven than the plaintiffs' damages and therefore a claim for the former may make a class action more readily seen to be the preferable procedure. [76] In these circumstances the plaintiffs' class action lawyer will often consider claims for unjust enrichment, waiver of tort or other forms of restitution such as quantum meruit.

The nature and scope of waiver of tort is far from clear. Indeed, the debate is still at the level of whether waiver of tort is a remedy, a cause of action or both. [77] The scope of waiver of tort has been argued in the recently concluded trial in Andersen v. St. Jude. [78] and the decision is pending In certification motions, at least, the courts have found that claims for waiver of tort are tenable. Thus, in appropriate cases it is possible that a plaintiff may elect between compensatory damages and an accounting for disgorgement of profits where the defendant has committed wrongful acts. In Serhan v. Johnson & Johnson the Divisional Court approved the viability of such a claim. [79] Indeed without the claim for waiver of tort the motion for certification would have failed because the claims other than waiver of tort were too individualistic for a class action to be the preferable procedure. [80]

There has been debate whether the wrongful act which must be established as an integral component of waiver of tort is restricted to deliberate acts such as those involved in nuisance or conspiracy or whether negligence will sustain a viable claim for waiver of tort. Justice Cullity has determined that, until the matter has been dealt with on a full trial record, it was appropriate to allow a claim for waiver of tort based on underlying negligence to proceed. [81]

Heward involved a claim based not only on negligence but also on unjust enrichment and waiver of tort in respect of an allegedly defective atypical antipsychotic drug called Zyprexa. The plaintiff class did not seek to certify a common issue in respect of individual damages. The relevant common issues originally proposed by the plaintiffs were:

"6. Can the past and future damages of the provincial health insurers be determined on an aggregate basis?

8. Are the defendants constructive trustees for all or any class members of all or any part of the proceeds of the sales of Zyprexa and if so, in what amount, and for whom are such proceeds held?

9. Are the defendants liable to account, by waiver of tort, to any of the class members on a restitutionary basis for any part of the proceeds of the sales of Zyprexa? If so, in what amount and for whose benefit is such accounting to be made?" [82]

The final order, dated June 6, 2007, approved the following common issues:

"(e) if one or more of common issues [e.g. general causation and failure to warn] are answered affirmatively, are Class members who are subsequently able to establish valid claims entitled to special damages for medical costs incurred in the screening, diagnosis and treatment of diseases related to Zyprexa?

(h) by virtue of waiver of tort, are the defendants liable on a restitutionary basis:

(i) to account to any of the Class, including the provincial insurers which have subrogated claims, on a restitutionary basis, for any part of the proceeds of the sale of Zyprexa? If so, in what amount and for whose benefit is such accounting to be made? Or, in the alternative,

(ii) such that a constructive trust is to be imposed on any part of the proceeds of sale of Zyprexa for the benefit of the Class, including the provincial insurers which have subrogated claims, and, if so, in what amount, and for whom are such proceeds held?" [83]

Justice Cullity found that it would not be possible for an aggregate determination of the provincial health insurers damages at the common issues trial. [84] Neither ss. 24(1)1(b) or (c) would be satisfied because the trial judge would first have to know what the individual claimants were recovering before the subrogated claims of the insurers could be determined. [85]

Justice Cullity did, however, approve the common issues in respect of waiver of tort and the possibility of a constructive trust or compensation on a restitutionary basis, i.e., a monetary award other than damages. [86] The court determined that the question of causation could be dealt with in respect of the class as a whole if the evidence at trial could establish either that the defendants knew that the drug was dangerously defective or they were negligent in marketing the drug without an appropriate warning of its side effects. The court considered that the trial judge might defer quantification of the compensation until individual issues had been decided, or a

least until the size of the class or the number of claimants had been determined. The court did not elaborate further on this point. [87]

Eli Lilly appealed primarily on the basis that the amount to be disgorged could not be a common issue. Eli Lilly argued that one would have to hear evidence from each consumer to determine whether they would have taken the drug if Eli Lilly had given a proper warning (i.e., disclosure of all side effects). In the case of Zyprexa, unlike many pharmaceutical cases, Health Canada had allowed the drug to remain in use, albeit with a significantly stronger warning.

The Divisional Court dismissed Eli Lilly's appeal. Justice Cumming stated that the doctrine of waiver of tort was too novel and undefined at this stage to reject this common issue. The court stated:

"Arguably, nothing the plaintiffs did or would have done mitigates the defendants' alleged wrongful conduct. If it were established that the defendants inadequately warned of the risks of the side effects of the drug so as to increase sales, there would be a live issue before the trial judge as to whether the defendants should disgorge all or part of the their profits, as well as whether the circumstances of individual class members requires consideration."

Furthermore, the court held that the requisite "wrongful conduct" might be found at trial to be based on Eli Lilly heaving manufactured a defective drug (one which was not fit for its purpose) rather than Eli Lilly's failure to give a proper warning. The former finding might well obviate any need to analyze each individual's circumstances. [88]

(ii) Bifurcation

The quantification of the monetary award based on waiver of tort has been postponed until after the common issues trial in other cases. [89] Dividing the case should, however, be the exception. In *Cannon*, the charitable tax shelter case, Justice Strathy declined to bifurcate the question of quantum of compensation arising from a waiver of tort claim on the basis that:

"(a) the issues of liability are not clearly separate from the issues of remedies. In particular, the fraud and unjust enrichment claims will require an examination of the benefits that the defendants have received from their actions, the same questions that will be asked in the waiver of tort claim;

(b) there is no obvious advantage to having the liability issues tried first;

(c) nor will it result in a substantial saving of time and expense;

(d) it will in fact likely lengthen the overall time frame of the proceeding; and

(e) there is no agreement between the parties that bifurcation is appropriate." [90]

Justice Strathy noted that the usual rule should be that all common issues should be resolved at the same time. In this case, the aggregate assessment of waiver of tort damages was not

anticipated to be particularly complicated or time consuming. [91] Thus, the court approved the common issues:

"(j) Are the Class Members entitled to pursue a restitution claim based upon waiver of tort as against [various defendants].

(k) If so, can the damages based upon a waiver of tort claim be assessed in the aggregate, and if so, in what amount?" [92]

It should be noted that a claim for waiver of tort may add considerably to the costs of a proceeding. Experts may be required not only on the accounting issues but even on the liability issue. Thus, in the recent trial in Andersen v. St. Jude the trial judge granted the defendants leave to file expert evidence with respect to the social and economic impact of the claim for waiver of tort in respect of the allegedly defective medical device which was the subject of the action. [93]

Furthermore, the defendants will bear the cost to produce the financial information with respect to the potential disgorgement claim and the plaintiffs may incur a heavy cost to analyse the information. These are important practical considerations in determining whether or how to proceed with a claim for waiver of tort.

Claims for unjust enrichment are sometimes viable in class actions, as was the case in *Wright v. UPS*, [94] but they are not generally tenable in pharmaceutical claims where the connection between the consumer who suffered a detriment, in the form of an undisclosed side effect, has been found not to be connected sufficiently to the financial benefit obtained by the drug manufacturer. [95]

(d) Damages in Statutory Claims

There are many statutes that lend themselves to class actions and provide for compensation to be paid to persons who are protected by the legislation. Three will be mentioned briefly, namely, the *Employment Standards Act*, [96] the *Securities Act* and the *Consumer Protection Act, 2002*, but other statutes are commonly [97] or uncommonly [98] relied on in class actions.

(i) ESA

The *Employment Standards Act* provides for termination pay and severance pay in appropriate circumstances. [99] Any breach of these provisions gives rise to a relatively mechanical calculation of damages. [100] Thus, any class action claim for compensation for a class of people who have been terminated or had their employment severed contrary to the *ESA* have a relatively easy calculation which depends entirely on the defendants' records and does not require an individual examination of the class members' records (although the latter would provide an appropriate check and balance if the calculation is being reviewed). [101] This straightforward statutory calculation is to be contrasted with the completely individualistic assessment of common law damages in the case of a mass wrongful dismissal in K-Mart. [102]

In K-Mart the only common issue certified was whether the approximately 5,000 employees who had been terminated when Zellers bought K-Mart were wrongfully dismissed. Unusually this common issue was accepted, not only in the sense that it was a legitimate common issue, but indeed the defendants conceded that the class members had been wrongfully dismissed. The defendant disputed, however, that there were any damages because they argued that the class members each got appropriate compensation packages. The plaintiff class had hoped that a few individual hearings to determine proper compensation would lead to a framework for compensation for everyone in the class. The defendants, however, insisted on dealing with everyone individually and the process degenerated into an expensive and unproductive morass. At this time, some 13 years after certification, less than 30 cases have been resolved, although the plaintiff class did successfully resist, in 2005, a motion to de-certify. [103]

(ii) Securities Act

A further example of a statutory claim is s. 130 of the Securities Act *[104]* which provides a remedy to a share purchaser for misrepresentation in a prospectus. The claim can be made against the issuer and underwriters, as well as directors and others who signed the prospectus or allowed their reports or statements to be used in the prospectus. This statutory claim is very important because the Act expressly dispenses with any need to prove reliance by the purchaser on the statements in the prospectus. [105] In Kerr v. Danier Leather [106] the trial judge after a 44 day trial granted damages to the plaintiff class based on a differential of $2.35 per share. Ultimately, however, the Supreme Court of Canada rejected the claim because there had not been a "material change" under the Securities Act and awarded significant costs against the plaintiffs.

S. 138.8 of the Securities Act is also commonly pleaded in securities class actions. It provides for civil liability in specified circumstances for misrepresentation in relation to secondary market share purchases. However, unlike s. 130 (prospectuses) s. 138.8 requires leave to be granted by the court before such a claim can be brought. Leave will be granted where the court is satisfied the action is brought in good faith and that there is a "reasonable possibility" that the action will be resolved in favour of the plaintiff. [107] The s. 138 secondary market claim, like s. 130, dispenses with the need to prove reliance on the part of each individual shareholder, [108] but it does impose significant limits on damages. [109]

The calculation of damages in a securities class action is always contentious. [110] One frequent question, for example, is whether a class member who bought during a period when the share price was artificially inflated can claim damages when they sold the shares prior to the truth being revealed and therefore prior to the share price dropping as a result of that revelation. [111]

In a prospectus case, s. 130(7) of the Securities Act provides that the defendant is not liable for any part of the damages that the defendant proves did not arise as a result of the misrepresentation. Thus, as Justice Strathy recently concluded, it may be appropriate to exclude "early sellers" from a class definition because no damages will have been suffered prior to the revelation of the misrepresentation. This issue will, however, be best left in some circumstances for the trial judge. [112]

In a claim for a misleading prospectus (s. 130) Justice Strathy did consider that an appropriate common issue might read as follows:

"What was the depreciation in value if any of the Gammon shares as a result of the misrepresentations in the Prospectus?" [113]

Justice Strathy noted that the defendants would have the onus of proving that the depreciation in value of the shares was not due to their misrepresentations and thus the issue could be determined on a common basis.

Furthermore, Justice Strathy concluded that it was appropriate to recognize a cause of action and certify a common issue in respect of a claim against the underwriters (and only the underwriters) for unjust enrichment and waiver of tort in connection with the prospectus. [114] In short, the plaintiff class, as an alternative to its claim for damages, might elect to claim disgorgement of the underwriting commissions earned by the underwriters as a result of their negligence. [115]

(iii) Consumer Protection Act, 2002 [116]

Consumer class actions often rely on ss. 17-18 of the Consumer Protection Act, 2002 involving the common issue of whether the defendant is liable for an unfair practice or an unconscionable transaction. Such issues have been certified in a number of cases in Ontario. [117] The relevant remedy sought in Cannon was:

"An order granting rescission of the Gift Program contracts and granting damages to the Class, including exemplary and punitive damages." [118]

Beyond this limited common issue, however, Justice Strathy did not accept that damages were an appropriate common issue. [119]

(e) Punitive and Aggravated Damages

The test for punitive damages was restated by the Supreme Court of Canada in Whiten v. Pilot Insurance Company. [120] The court held that punitive damages were the exception rather than the rule and to be imposed only if there was highhanded and malicious or arbitrary misconduct beyond the ordinary standards of decent behaviour. Furthermore, the court held that punitive damages should be awarded when compensatory damages are insufficient to accomplish the policy objectives (described in the judgment) and they are to be no greater than necessary to rationally accomplish that purpose. More importantly for present purposes, the court held that punitive damages should be assessed in an amount reasonably proportionate to factors which include the harm caused, the degree of misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant. This suggests that a trial judge may need to consider the impact of the defendant's conduct on each individual plaintiff.

Different approaches have been taken to this test by the class action judges in Ontario. In Robinson v. Medtronic Inc. [121] which involved a defective medical product, Justice Perell held that the question of punitive damages should not be certified as a common issue because it would

require an assessment of each individual's circumstances to determine the appropriate punitive damages award.

Justice Hoy took a different approach, however, in Peter v. Medtronic Inc. (a related medical product case) [122] as did Justice Lax in Banyan Tree [123] (a tax shelter case) when she certified a common issue:

"Should an award of punitive damages be made against the defendants? If so, in what amount?" [124]

Justice Lax concluded that the issue could be certified, even though the amount would only be determined after the conclusion of the individual proceedings and the determination of the general damages.

Justice Strathy has similarly concluded that at least the prima facia entitlement to punitive damages could be determined in a common issues trial, even though the ultimate liability for and quantum of punitive damages might have to await subsequent determination. [125] The common issue certified by him in *Cannon* was:

"Does the conduct of the defendant justify an award of punitive damages." [126]

In Fulawka (the bank unauthorized overtime case) Justice Strathy took a similar approach concluding that it may be possible not only to assess damages on an aggregate basis due to the systemic nature of the wrongs, but also the punitive damages as well as aggravated damages. [127]

(f) Cy-près Distribution of Damages

When Cassano v. TD Bank ultimately settled the bank agreed to compensate the plaintiff class for undisclosed and unauthorized fees it had charged on certain foreign currency transactions. The Court of Appeal, when it had approved certification, had contemplated that ss. 24-26 of the Class Proceedings Act would likely provide means to determine compensation and how it should be distributed to the class. The ultimate settlement, however, did not attempt to identify all the class members, primarily because the costs associated with that task would have exhausted the settlement proceeds.

The Superior Court approved a settlement which awarded compensation to class members who could readily be identified but the rest was distributed cy-près. [128] Ultimately, only about $11,000,000.00 was distributed to the cardholders and $28,000,000.00 was paid out on a cy-près basis. 50% of the cy-près amount was paid to the Law Foundation of Ontario to support projects relating to access to justice and the balance went to The Social and Enterprise Development Innovations to provide literacy training to economically disadvantaged Canadians.

In *Tesluk v. Boots Pharmaceuticals PLC* [129] (Synthroid) where the class size was 520,000 people, the compensation would have amounted to about $30.00-$70.00/person. The court agreed to a cy-près distribution of the entire settlement to five charitable or educational facilities,

in part because the administrative and other costs made the distribution of the funds to the class members impractical. [130]

It has been argued that such cy-près awards may not be the most appropriate means of distributing damages awarded in these settlements, and that such awards should be more carefully reviewed and policed by the courts. [131]

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[1] Class Proceedings Act, 1992, S.O. 1992, c. 6 (the Act).

[2] *Ibid*. s. 5.

[3] *Ibid*. s. 6.1.

[4] *Ibid*. s. 6.3.

[5] *Ibid*. s. 15.1.

[6] *Ibid*. s. 15.2.

[7] *Ibid*. s. 15.3(d.

[8] *Ontario Law Reform Commission, Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982) at p. 541.

[9] The Act, *supra*, s. 25(3).

[10] The Act, *supra*, s. 26(2)(c).

[11] The Act, *supra*, s. 26(8).

[12] *Cloud v. Canada (Attorney General)*, 2004 CarswellOnt 5026 (C.A.) (*Cloud* cited to C.A.); leave to appeal denied, 2005 CarswellOnt 1866 (S.C.C.) This followed on the Supreme Court trilogy of *Rumley v. British Columbia*, [2001] 3 S.C.R. 184; *Hollick v. Metrotopolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158; and *Western Canada Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534.

[13] Cloud, ibid. para. 52.

[14] Ibid. paras. 52-93.

[15] Ibid. para. 68.

[16] Ibid. para. 83.

[17] Ibid. para. 90.

[18] See, e.g., Simmonds v, Armtec Infrastructure Inc,, 2012 ONSC 44, paras. 30, 43 and 45, and Smith v. Sino-Forest Corporation, 2012 ONSC 24, paras. 311and 326.

[19] Cassano v. Toronto Dominion Bank, 2007 CarswellOnt 7341, 2007 ONCA 781. (*Cassano*) For a discussion of aggregate damages before Markson, infra, and Cassano see two articles taking different positions, Harvin Pitch and Matthew Sokolsky, "Class Action Damages: Assessing Aggregate Damages in Class Action Limited" (2005) 2 Canadian Class Action Law Review 41 and Laura Fric and Timothy Morgan, "The Impact of Aggregate Assessment of Damages on Certification Motions" (2005) 2 Canadian Class Action Law Review 27. See also *Garland v. Consumers Gas*, [1998] 3 S.C.R. 112, which focused on unjust enrichment but also included actuarial and statistical evidence intended to establish a criminal interest rate arising from a late payment penalty.

[20] Cassano, *ibid*. para. 12.

[21] *Ibid*. para. 27.

[22] *Ibid*. para. 27, citing Attorney General v. Blake, [2001] 1 A.C. 268 (H.L. Eng.) and Bank of America Canada v. Mutual Trust Co., [2002] 2 S.C.R. 601 (S.C.C.)

[23] As was implied in *Heward v. Eli Lilly & Co.*, 2008 CarswellOnt 3837 (Div. Ct.), para. 36.

[24] Cassano, supra, para. 15.

[25] *Ibid*. para. 14.

[26] For a detailed discussion see Cassano, supra, paras 26-38.

[27] The Act, *supra*, s. 24.(1).

[28] 2007 CarswellOnt 2716 (C.A.) (*Markson*); leave to appeal denied 2007 CarswellOnt 7420 (S.C.C.)

[29] Cassano, *supra*, para. 45.

[30] *Ibid*. para. 46.

[31] *Ibid*. para. 47.

[32] *Ibid*. para. 49. See also Markson, *supra*, paras. 48-51.

[33] Markson, *ibid*. per Rosenberg J.A. at para. 50, citing Gilbert v. CIBC, 2004 CarswellOnt 4231 (S.C.J.) (Winkler, J., on consent).

[34] Cassano, *supra*, para. 52.

[35] *Ibid*. paras. 55 and 62.

[36] *Ibid*. para. 63.

[37] *Ibid*. para. 66.

[38] 2003 CarswellOnt 49.

[39] Markson, *supra*, para. 44.

[40] *Ibid*. para. 41.

[41] *Ibid*. paras. 55-56.

[42] *Ibid*. para. 49.

[43] *Ibid*. para. 49.

[44] *Ibid*. paras. 57(a) and 59.

[45] 2004 CarswellOnt 6141 (S.C.J.)

[46] See also *578115 Ontario Inc. v. Sears Canada*, 2010 ONSC 4571, paras. 66-67 (CanLII), where Strathy J. dismissed similar arguments by the defendants.

[47] 2010 CarswellOnt 1057 (S.C.J.) (*Fulawka* cited to S.C.J.)

[48] 2011 CarswellOnt 5491 (*Fulawka* cited to Div. Ct.) .

[49] Fulawka cited to S.C.J., supra, para. 130 quoting Markson para. 49: "i.e., it may be that in the result some class members who did not actually suffer damage will receive a share of the reward. However, this is exactly the result contemplated by ss. 24(2) and (3) because 'it would be impractical or inefficient to identify the class members entitled to share in the reward.'"

[50] Fulawka cited to S.C.J., *supra*, Appendix, Group F.

[51] Ibid. para. 151.

[52] Ibid. Strathy J., para. 160.

[53] Fulawka cited to Div. Ct., para. 126.

[54] Ibid. Divisional Court, para. 128.

[55] Ibid. Divisional Court, para. 131.

[56] 2012 CarswellOnt 503 (S.C.J.) (*Cannon*).

[57] Ibid. para. 362.

[58] Ibid. para. 365. The court accepted that, by virtue of s. 6, the fact that damages may require individual assessment would not be a bar to certification.

[59] Ibid. supra, para. 368.

[60] *Wilson v. Servier*, 2000 CanLII 22407; 50 O.R. (3d) 219 (S.C.J.), *Heward v. Eli Lilly & Co.*, 2008 CarswellOnt 3837, *Peter v. Medtronic Inc.*, 2010 CarswellOnt 5221.

[61] Heward, *supra*, paras. 92-93.

[62] Ibid. para. 92.

[63] Ibid. para. 93. Although this distinction is open to considerable debate.

[64] Cloud, *supra*, para. 70.

[65] Healey v. Lakeridge Health Corp., 2011 CarswellOnt 299 (C.A.) (Healey); Vezina v. Loblaw Cos. 2005 CarswellOnt 4646 (S.C.J.)

[66] Healey, ibid. para. 71. But c.f. *Denis v. Bertrand & Frère*, 2008 CarswellOnt 18761 (S.C.J.), where liability of the manufacturer of defective concrete was first determined in a test case (*Alie v. Bertrand & Frère*, [2000] O.J. 1360) and, in the class action, damages of three class members were assessed as a basis for the other claims. See para. 30 where the court assessed damages for all individuals' hardship and stress without medical evidence and without case by case analysis.

[67] 1999 CarswellOnt 2073 (C.A.) (*Anderson*)

[68] Ibid. pp. 678-680.

[69] [2012] ONSC 1322 (Div. Ct.)

[70] This decision applied the earlier Court of Appeal decision in *Taylor v. Canada (Attorney General)*, 2009 CarswellOnt 3443 (C.A.)

[71] *Smith v. Inco Ltd.*, 2011 CarswellOnt 10141 (C.A.) (*Inco*, trial decision, cited to C.A.)

[72] *Pearson v. Inco Ltd.*, 2002 CarswellOnt 2446 (S.C.J.)

[73] *Pearson v. Inco Ltd*, 2005 CarswellOnt 6598 (C.A.) (*Inco*, certification decision, cited to C.A.)

[74] *Inco*, trial decision, cited to C.A., para. 114.

[75] *Ibid. supra*, para. 122.

[76] But c.f. *Cassano, supra*, para. 27 and footnote 22 above.

[77] See Aronowicz v. Emptwo Properties Inc., 2010 CarswellOnt 598 (C.A.) paras. 80-82 and Cannon, supra, para. 356.

[78] 2003 CarswellOnt 3478 (S.C.J.) It may be noted that the higher courts have recently been receptive to novel claims, albeit in individual actions. See, e.g., *Jones v. Tsige*, 2012 ONCA 32 (maximum damages of $20,000.00 for "intrusion upon seclusion") and *Ward v. Vancouver (City)*, [2010] 2 S.C.R. 28 ($5,000.00 for breach of Charter rights).

[79] 2006 CarswellOnt 3705 per Epstein and Jennings, J., Chapnik J. dissenting (*Serhan*), aff'ing . Leave to appeal dismissed, 2007 CarswellOnt 2150 (S.C.C.)

[80] Serhan, *ibid.* para. 3 and 159. (Although on certification Cullity J. stated that the claim for conspiracy could form the basis for the claim in waiver of tort, even though the proposed common issue relating to conspiracy was not certified: *Serhan Estate v. Johnson & Johnson*, 2004 CanLII 1533 (S.C.J.) para. 63-65).

[81] Heward v. Eli Lilly & Co., 2007 CanLII 2651 (S.C.J.), para. 47-49 (*Heward* cited to S.C.J.); aff'd 2008 CarswellOnt 3837 (Div. Ct.)

[82] Heward cited to S.C.J., *ibid.* para. 77.

[83] Heward cited to S.C.J., supra (order of Justice Cullity, dated June 6, 2007), para. 5.

[84] *Ibid.* para. 94.

[85] *Ibid.* para. 95.

[86] *Ibid.* paras. 99-102.

[87] *Ibid.* para. 102.

[88] *Heward* cited to Div. Ct., paras. 31 and 36.

[89] Schick v. Boehringer Ingelheim (Canada) Ltd., 2011 CarswellOnt 2096; *Peter* v. Medtronic, 2010 CarswellOnt 5221; Andersen v. St. Jude, 2003 CarswellOnt 3478.

[90] Cannon, *supra*, para. 360.

[91] *Ibid.* para. 361.

[92] *Ibid.* paras. 354 and 358.

[93] Andersen *v. St. Jude*, 2011 ONSC 2178 (CanLII) (motion re admission of evidence). The parties in Andersen had agreed that if waiver of tort was allowed the quantification of compensation would be dealt with after the common issues trial.

[94] *Wright v. UPS*, [2011] O.J. No. 3936, paras. 64-65. See also *Garland v. Consumers Gas*, *supra* and *Garland v. Consumers Gas*, [2004] 1 S.C.R. 629 in which Consumers was ordered on the basis of unjust enrichment to repay late payment penalties collected in excess of the criminal interest rate in an amount to be determined by the trial judge.

[95] *Heward*, *supra*, para. 65

[96] 2000 S.O. 2000, c. 41 (ESA).

[97] *Competition Act*, R.S.C. 1985 c. C-34 ss. 36 and 52 (misrepresentations in advertising or marketing).

[98] *Insurance Companies Act*, S.C. 1991, c. 47, ss. 166, 331, 458, 462 and 1031 are discussed at length in *Jeffery v. London Life Insurance Company*, 2011 ONCA 683.

[99] ESA, *supra*, paras. 56 and 63.

[100] See ss. 57 and 65(1) of the ESA.

[101] *Kafka v. Allstate Insurance Co. of Canada*, 2011 Carswell Ont 3118, para. 198.

[102] *Webb v. K-Mart Canada Ltd.*, 1999 CanLII 15076 (S.C.J.)

[103] *Webb v. 3584747 Canada Inc.*, 2005 CanLII 3226 (S.C.J.); leave to appeal refused 2005 CanLII 29340 (Civ. Ct.)

[104] R.S.O. 1990, c. S.5 (*Securities Act*).

[105] *Ibid.* s. 130(1).

[106] 2004 CanLII 8186 (S.C.J.); rev'd [2007] 3 S.C.R. 331.

[107] Ainslie v. CV Technologies Inc., 2008 CarswellOnt 7227 and Silver v. Imax Corp., 2009 CarswellOnt 7873; leave to appeal refused 2011 ONSC 1035 (CanLII) (Div. Ct.)

[108] Securities Act, *supra*, s. 138.3.

[109] *Ibid.* ss. 138.5-138.7.

[110] See, e.g., McKenna v. Gammon Gold, 2010 CarswellOnt 1460, paras. 119-122 (*McKenna*).

[111] McKenna, supra, para. 119. See also Carom v. Bre-X Minerals Ltd. (1999) 46 O.R. (3d) 315 (Div. Ct.) paras. 21-23; varied on other grounds (2000) 51 O.R. (3d) 236 (C.A.) See also Kerr v. Danier Leather Inc., [2004] 446 B.L.R. 167 (Ont. S.C.J.) para. 345; reversed on other grounds [2007] 3 S.C.R. 331.

[112] McKenna, *ibid.* para. 122.

[113] Ibid. para. 166.

[114] Ibid. paras. 70, 127(f) and 165.

[115] Claims against mutual funds for "market timing" appear to be based primarily on breach of fiduciary duty and negligence. See, e.g.,*Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47 (CanLII), para. 18, in which expert evidence was filed to show that investors' losses exceeded payments by the defendants to the OSC.

[116] S.O. 2002, c.30, Schedule A.

[117] See, for example, Ramdath v. George Brown College of Applied Arts and Technology, 2010 CarswellOnt 2038; Matoni v. CBS Interactive Multimedia Inc., 2008 CarswellOnt 228; *Cannon v. Funds for Canada Foundation*, 2012 CarswellOnt 503, per Strathy J. paras. 333-339 and *Wright v. UPS*, *supra*, (2011), paras. 351-366.

[118] Cannon, *supra*, para. 335(c).

[119] Ibid. para. 365. *Consumer Protection Act* claims are not always certified: see Singer v. Schering-Plough, [2010] O.J. No. 113 but c.f.*Wright v. UPS*, *supra*.

[120] [2002] S.C.C. 18. See also *Richard v. Time Inc.*, 2012 SCC 8, where the SCC awarded $15,000.00 in punitive damages for breach of Québec's consumer protection legislation.

[121] 2009 CarswellOnt 6337, paras. 188-190; aff'd 2010 ONSC 3777, [2010] O.J. No. 3056 (Div. Ct.)

[122] [2007] O.J. No. 4828, para. 105; leave to appeal refused [2008] O.J. No. 1916.

[123] *Robinson v. Rochester et al.*, 2010 ONSC 463 (CanLII) (S.C.J.) (*Banyan Tree*).

[124] *Ibid.* para. 61.

[125] Schick v. Boehringer Ingelheim (Canada) Ltd., [2001] O.J. No. 1381 (S.C.J.) and Cannon, *supra*, paras. 369-378.

[126] *Cannon*, *ibid.* para. 378.

[127] Fulawka cited to S.C.J., *supra*, para 152 citing in respect of aggravated damages Currie v. MacDonald's Restaurants of Canada Ltd., [2007] O.J. No. 3622 (Ont. S.J.), DeWolf v. Bell ExpressVu Inc., 2009 CarswellOnt 6698 and 2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. 2009 CanLII 23374 (Div. Ct.); Justice Strathy's decision on remedies was affirmed by the Divisional Court, without reference to punitive or aggravated damages: *Fulawka* cited to Div. Ct., *supra*, paras. 122-133.

[128] See s. 26(4) of the Act which permits unclaimed class funds to be distributed to a third party for the indirect benefit of the class.

[129] 2002 CarswellOnt 1266.

[130] *Ibid.* per Winkler J., para. 9.

[131] E. Rebecca Potter and Natasha Razack "Cy-près Awards in Canadian Class Actions: A Critical Interrogation of What is Meant by 'As Near as Possible'", (2010) 6 The Canadian Class Action Review 299. See also Christina Sgro "The Doctrine of Cy Près in Ontario Class Actions: Toward a Consistent, Principled and Transparent Approach", (2011) 7 The Canadian Class Action Review 267.