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It has long been said that if a proposed class action is certified, it will settle. To a large extent, that has been true. However, as Wendy Matheson and James Gotowiec of Torys LLP point out, this is no longer necessarily so. That being the case, the authors take a closer look at the common issues trial: while there are limited legislative shortcuts relating to proof of damages and a few procedural differences, litigating the merits should be no different than litigating the merits of any case……..29

It has been almost nine years since *Serhan Estate v. Johnson & Johnson* where a class action was certified on the basis of waiver of tort alone, but the issue of whether waiver of tort is a cause of action or an election of remedies still requiring proof of all the elements of the underlying tort remains unresolved. Adrian Lang and Vanessa Voakes of Stikeman Elliott LLP review what has been said about waiver of tort since *Serhan*, noting that courts have chosen to certify and leave the determination of this issue to trial on a full factual record. Unfortunately, the trial in which it might be possible to do so has not materialized. However, recent judicial comment suggests that, perhaps, the issue will be addressed on certification after all……..….35

THE CLASS ACTION TRIAL: THE MERITS ARE BACK

Wendy Matheson
PARTNER
TORYS LLP

James Gotowiec
ASSOCIATE
TORYS LLP

As Quebec's class proceedings regime enters its fourth decade and Ontario's regime moves into its 21st year, the "if it is certified, it will settle" paradigm is gone. More class actions go to trial, and counsel's attention has shifted from certification to the differences between conducting a class proceeding trial and conducting an ordinary trial. Are there differences? Yes. But, with minor exceptions, the plaintiffs must still prove their case at trial. The merits are and should be the focus of a common issues trial, not the policy considerations that inform the question whether or not a claim should proceed as a class action in the first place.

Below, we discuss key differences between class action trials and ordinary trials, as well as highlights from certain class actions that have gone to trial.

Trial Experience

Canada has seen about 90 common issues trials since class proceedings legislation was first enacted in Quebec.[1] Not surprisingly, the majority of those trials have been in Quebec. Ontario has had more than 15 trials, followed by British Columbia with less than 10; other jurisdictions have had one or none.

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Class action trials can be highly complex and lengthy. Of the Ontario trials thus far, five common issues trials were longer than 25 days, with the longest taking 138 days for evidence, followed by lengthy closing argument.[2] These trials were characterized by extensive expert evidence and were similar to major commercial or product liability trials outside the class proceedings context. At the other end of the spectrum, a recent common issues trial, *Ramdath v. George Brown College of Applied Arts and Technology*,[3] was completed in only two days because all the evidence was given through affidavits and read-ins.

The lengthy Ontario trials have covered a wide variety of subject matter:

- *Andersen v. St. Jude Medical, Inc*.[4] This 138-day product liability trial related to artificial heart valves and was brought on behalf of the people who had the devices implanted and their families.[5] The claim was dismissed at trial and is now under appeal.
- *Jeffrey v. London Life Insurance Co.*[6] This 44-day trial was a statutory compliance action under the *Insurance Companies Act*[7] and was brought on behalf of certain life insurance policyholders. The trial judge dismissed most but not all of the claimed breaches. The Court of Appeal then set aside most of the remaining findings against the defendants and reversed or substantially reduced the remedial orders. The plaintiffs unsuccessfully sought leave to appeal to the Supreme Court of Canada.[8]
- *Kerr v. Danier Leather Inc*.[9] This 44-day trial related to securities disclosure obligations and was brought on behalf of purchas-

ers of Danier's shares in its initial public offering. The plaintiff prevailed at trial, but the Court of Appeal overturned the judgment and dismissed the action.[10] The Supreme Court of Canada affirmed the Court of Appeal's decision.[11]

- *Mandeville v. Manufacturers Life Insurance Company*[12] This 29-day trial related to an alleged duty to preserve demutualization benefits on a business transfer and was brought on behalf of the transferred participating policyholders. The claim was dismissed at trial and is now under appeal.
- *Smith v. Inco*[13] In this 45-day trial, the plaintiffs alleged that property values were reduced as a result of soil contamination. The trial was brought on behalf of owners of residential properties within a specific area. The trial judge found in favour of the plaintiffs; however, the Court of Appeal set aside that judgment and dismissed the claim, and leave to appeal to the Supreme Court of Canada was denied.[14]

There are obviously significant risks in major litigation of this kind. While it seems that the Ontario Class Proceedings Fund is protecting some unsuccessful plaintiffs from adverse costs awards in many cases (it has funded a number of the long Ontario trials mentioned above), cost consequences can be substantial.[15]

Proving the Case on the Merits

While a favourable certification decision may be portrayed as a success for a plaintiff, it is not a success on the merits. Class proceedings legislation generally makes clear that an order certifying a class proceeding is not a determination of the merits.[16] The claim must still be proved, and there are only limited shortcuts, regarding damages, provided in class proceedings legislation. A common issues trial should therefore not be viewed differently from a regular trial in respect of proving liability. Several appellate court decisions have emphasized that these claims must be proved in the usual way.

The Supreme Court of Canada recently emphasized this principle, as follows:

> This Court has stated on several occasions that a class action is merely a procedural vehicle and that its use does not have the effect of changing the substantive rules applicable to individual actions [citations removed]. In other words, the class action mechanism cannot be used to make up for the absence of one of the constituent elements of the cause of action. A class action can succeed only if each claim it covers, taken individually, could serve as a basis for court proceedings.[17]

Nadon v. Montréal (Ville de)[18] is illustrative. This case was a class action brought on behalf of hay fever sufferers living on the Island of Montreal. The plaintiffs argued that member municipalities contravened specific by-laws requiring property to be kept free of ragweed during a certain period each year and sought $1.8 billion in damages. The trial lasted 84 days, following which the trial judge found that the plaintiffs had failed to prove their claim.[19] The Quebec Court of Appeal upheld the trial judge's decision, emphasizing that the general rules of civil liability and evidence do not change simply because the case was brought as a class proceeding.[20]

This theme was emphasized by the Supreme Court of Canada in *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*,[21] a case arising from illegal strikes at a hospital. The Supreme Court noted that in a class action, "the elements of fault, prejudice and causal connection must be established in respect of the members of the group, by normal evidentiary rules."[22]

The Ontario Court of Appeal has also rejected a different approach to the determination of the merits in class actions. In *Jeffrey v. London Life,* the plaintiffs argued that the remedial provision of the statute should be interpreted more expansively, with the class proceedings' goal of "behaviour modification" in mind. On the contrary, the Court of Appeal held as follows:

> The CPA is procedural legislation that opens the door to classes of individuals who would otherwise be unable to sue, to do so. … However, the nature and scope of the relief granted in a class proceeding must flow from the statutory cause of action that is asserted. … [T]he interpretation … of the remedy under that provision does not change with the type of proceeding commenced.[23]

Similarly, in *Smith v. Inco*, the Ontario Court of Appeal held that a "class action is a procedural vehicle. Its use does not have the effect of changing the substantive law applicable to individual actions."[24]

The Supreme Court of Canada's decision in *Kerr v. Danier Leather* also reinforces this point from the perspective of a costs award. Justice Binnie, writing for the court, described the case as related to "the usual fodder of commercial litigation," observing that "there is no magic in the form of a class action proceeding that should in this case deprive the respondents of their costs."[25]

Legislative Shortcuts

There are two areas in which class proceedings legislation in Ontario and some other jurisdictions potentially streamline the requirements for proof at trial. Both those areas relate to damages.

Statistical evidence[26] In Ontario and most other provinces, class proceedings legislation allows the court to admit as evidence statistical information that would not otherwise be admissible in order to determine issues related to the amount or distribution of a monetary award under that legislation—that is, aggregated damages. To benefit from these statutory provisions, notice as well as an opportunity to cross-examine must be given.[27]

Aggregate damages[28] With respect to assessing damages, class proceedings legislation generally allows a judge to determine the aggregate or a part of a defendant's liability to class members if monetary relief is claimed and certain criteria are met.[29] In considering whether to make such an order, the court must consider whether it would be impractical or inefficient to identify the class members entitled to share in a monetary award or allocate the exact shares to individual class members. Where applicable, the aggregate damages regime may streamline the damages portion of a trial.

Role of the Representative Plaintiff at Trial

As a matter of practice, the representative plaintiffs are often called as witnesses at trial, even though their role as fact witnesses may be unclear. The role of representative plaintiffs as fact witnesses may well vary from case to case, but when they do testify, it is not always favourable to their case.[30] Related questions arise regarding the weight that should be given to their testimony, its scope, and whether other class members should also be called to testify. While the law in this area may develop more fully as trials become increasingly common, it is reasonable to conclude that the selection of the representative plaintiff could have consequences for the trial of the common issues.

Other Procedural Differences

Who Is the Trial Judge?

One issue on which there is some divergence between the provinces is whether the judge case-managing the class action should also preside at the trial. In Alberta, Manitoba, and Ontario, the default

rule is that the case-management judge does not preside at the common issues trial unless the parties consent.[31] In Quebec, the presumption is the opposite: unless the chief justice decides otherwise, the same judge "hears the entire proceedings relating to the same class action."[32] The remaining provinces occupy a middle ground: the case-management judge may, but need not, preside at the common issues trial.[33]

The provincial law reform commissions that considered this issue identified two competing concerns: (i) ensuring the efficient use of judicial resources by allowing a judge who is thoroughly acquainted with the issues to preside at trial, and (ii) ensuring fairness and the appearance that the judge has not prejudged any of the issues.[34] Faced with competing goals, more policymakers appear to have decided that the appearance of fairness outweighs judicial economy. However, lawmakers in every province have allowed the parties at least the option of having the same judge case-manage the proceeding and preside at trial.

Amendment of Pleadings and Common Issues

Outside the class proceedings context, pleadings generally may be amended unless this would result in prejudice that cannot be compensated by costs or an adjournment, including during a trial.[35] However, different considerations come into play in a class proceeding, particularly, when the amendments are sought after the action has been certified. As a judge of the Ontario Superior Court has noted, amendments to a pleading in a class action "are significant not only to a party's claim or defence, which is their chief role, but they also may affect the certification criteria of class definition, common issues, and preferable procedure."[36] Allowing a pleading to be amended after certification may also have implications regarding notice to class members and decisions to opt out of the class.

The rules of court in Nova Scotia, Newfoundland, Quebec, and Saskatchewan expressly require that a judge must approve amendments after certification.[37] Although the Ontario legislation does not include a special provision for amendments in class proceedings, in a recent class action Justice Perell of the Ontario Superior Court held that leave of the court to amend "should always be sought" in class proceedings and that the court "should scrutinize the proposed amendments having regard to their effect on the class proceeding."[38]

Justice Perell reviewed the jurisprudence on this point and held that a key factor in the decision to allow an amendment to a pleading in a class action is whether the amendment fundamentally changes the nature of the action. If the amendment would require reconsidering the matters originally considered in the application for certification, he observed that the court would be not be likely to grant leave.[39]

Nonetheless, in *Andersen v. St. Jude Medical*, the plaintiffs brought a motion to amend to add waiver of tort as a cause of action less than two weeks before the trial was set to begin (and six years after the proceeding was certified). The trial judge allowed the amendment primarily because she viewed the new claim as "an alternative theory of liability based upon the same factual matrix"[40] even though it could have a significant impact on the remedy available to class members and could therefore have been relevant to making the decision of whether or not to opt out.

The related issue of amendments to common issues has also arisen at trial. Despite the fact that the certification order is intended to define the boundaries

of a common issues trial, in *Smith v. Inco Ltd.*, the trial judge invited the plaintiff to bring a motion to amend the common issues after the trial evidence and argument were complete. This process raises a number of significant questions, given the role of the common issues in the discovery and trial process; yet amendments were permitted by the trial judge in this case.[41]

It's Not Over until It's Over

Of course, unlike an ordinary trial, a common issues trial may not determine the case completely. If individual issues must be decided, a decision in respect of the issues common to the class may be only the beginning of the process through which questions such as liability and quantification of damages will need to be determined. In addition, it may be only the first part of a bifurcated trial.

Both of these situations would have occurred if the trial judge had found for the plaintiffs in *Andersen v. St. Jude Medical*. If the claim had not been dismissed, further proceedings for the determination of individual issues would have had to take place before any remedy was potentially ordered. An additional proceeding was also contemplated, following the determination of the individual issues, to assess whether the defendants' conduct merited an award of punitive damages and, if so, in what amount.[42]

The Merits Are Back

As class proceedings regimes mature, the focus is no longer mainly on certification. It has turned toward the merits of these cases. With few exceptions, litigating the merits in a class proceeding should be no different from that in any other trial, which is as it should be.

[*Editor's note*: Torys LLP was defence counsel in two of the trials mentioned in this article: *Jeffery v. London Life* and *Mandeville v. Manulife*.]

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1 All provinces except Prince Edward Island have class proceedings legislation. Unless otherwise noted, a reference to a province and section number is that province's class proceedings legislation. British Columbia: *Class Proceedings Act*, R.S.B.C. 1996, c. 50; Alberta: *Class Proceedings Act,* S.A. 2003, c. C-16.5; Saskatchewan: *The Class Actions Act*, S.S. 2001, c. C-12.01; Manitoba: *The Class Proceedings Act*, C.C.S.M. c. C130; Ontario: *Class Proceedings Act, 1992*, S.O. 1992, c. 6; Quebec: *Code of Civil Procedure*, R.S.Q. c. C-25, Book IX; New Brunswick: *Class Proceedings Act*, R.S.N.B. 2011, c. 125; Nova Scotia: *Class Proceedings Act*, S.N.S. 2007, c. 28; Newfoundland: *Class Actions Act*, S.N.L. 2001, c. C-18.1.

2 *Andersen v. St. Jude Medical, Inc.*, [2012] O.J. No. 2921 (Ont. Sup. Ct.) [*St. Jude Medical*].

3 [2012] O.J. No. 5389 (Ont. Sup. Ct.).

4 *St. Jude Medical*, *supra* note 2.

5 *Ibid.* at para. 1.

6 [2010] O.J. No. 4186 (Ont. Sup. Ct.) [*Jeffrey v. London Life*].

7 S.C. 1991, c. 47.

8 [2011] O.J. No. 4889 (Ont. C.A.), leave to appeal refused, [2012] S.C.C.A. No. 1 [*London Life ONCA*].

9 [2004] O.J. No. 1916 (Ont. S.C.J.).

10 [2005] O.J. No. 5388 (Ont. C.A.).

11 [2007] S.C.J. No. 44 [*Kerr SCC*].

12 [2012] O.J. No. 6083 (Ont. Sup. Ct.).

13 [2010] O.J. No. 2864 (Ont. Sup. Ct.).

14 [2011] O.J. No. 4386 (Ont. C.A.), leave to appeal refused, [2011] S.C.C.A. No. 539 [*Smith ONCA*].

15 For example, Inco was awarded $1.7 million in costs for its common issues trial, [2012] O.J. No. 4225 (Ont. Sup. Ct.), now under appeal.

16 See, *e.g.*, Ont. s. 5(5).

17 *Bou Malhab v. Diffusion Métromédia CMR inc.,* [2011] S.C.J. No. 9, at para. 52; see also, *Bisaillon v. Concordia University*, [2006] S.C.J. No. 19, at para. 17; *Dell Computer Corp. v. Union des consommateurs*, [2007] S.C.J. No. 34, at paras. 105–8; *St. Lawrence Cement Inc.v. Barrette,* [2008] S.C.J. No. 65, at para. 111.

18 [2007] Q.J. No. 305 (Q. Sup. Ct.).

19 *Ibid.* at paras. 9–10.

20 [2008] J.Q. no 11892 (C.A.Q.) at para. 36 (in French).

21 [1996] S.C.J. No. 90 (S.C.C.).

22 *Ibid*. at para. 33.

23 *London Life ONCA*, *supra* note 8 at para. 167.

24 *Smith ONCA*, *supra* note 14 at para. 164.

25 *Kerr SCC*, *supra* note 11 at paras. 65–66.

26 B.C.: s. 30; Sask.: ss. 32–33; Man.: s. 30; Ont.: s. 23; N.B.: s. 32; N.S.: s. 33; Nfld.: s. 30; does not appear in Alberta's statute: Final Report no. 85 (Edmonton: Alberta Law Reform Institute, 2000) at 132.

27 *Ibid.* (excluding reference to Alberta).

[28] A full discussion about the availability of aggregated damages is a topic in itself and beyond the scope of this article.

[29] B.C.: ss. 29, 31, 32; Alta.: ss. 30–32; Sask.: ss. 31, 34–35; Man.: ss. 29, 31–32; Ont.: s. 24; Que.: art. 1033.1; N.B.: ss. 31, 33–34; N.S.: ss. 32, 34–35; Nfld.: ss. 29, 31–32.

[30] For example, in *Jeffrey v. London Life, supra* note 6, evidence from one of the representative plaintiffs featured prominently in the defence case.

[31] Alta.: s. 15; Man.: s. 14(3); Ont.: s. 34(3).

[32] Que.: art. 1001.

[33] B.C.: s. 14(3); Sask.: s. 16(3); N.B.: s. 16(2); N.S.: s. 17(2), Nfld.: s. 15(3). New Brunswick's and Newfoundland's statutes do not contain the "but need not" qualifier.

[34] Ontario Law Reform Commission, *Report on Class Actions*, Vol. 2 (Toronto: Ministry of the Attorney General, 1982) at 458; Final Report no. 85 (Edmonton: Alberta Law Reform Institute, 2000) at 112.

[35] For example, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 26.01.

[36] *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation,* [2009] O.J. No. 4376, at para. 79 (Ont. Sup. Ct.) [*Quizno's*].

[37] N.S.: *Civil Procedure Rules,* Rule 68.04; Nfld.: *Rules of the Supreme Court*, Rule 7A.08; Que.: *Code of Civil Procedure*, art. 1016; Sask.: *Queen's Bench Rules*, Rule 83.

[38] *Quizno's*, s*upra* note 36*;* see also, *e.g*., *Lacroix v. Canada Mortgage and Housing Corp.*, [2007] O.J. No. 1648 (Ont. Sup. Ct.); *Comité d'environnement de la Baie inc. v. Société d'électrolyse et de chimie Alcan ltée* (1992)*,* [1992] J.Q. no 447 (C.A.Q.).

[39] *Quizno's*, *ibid.* at para. 86.

[40] *Andersen v. St. Jude Medical*, [2010] O.J. No. 8 at para. 12 (Ont. Sup. Ct.) [*St. Jude Medical Amendment Decision*].

[41] (2010), 208 A.C.W.S. (3d) 26 (S.C.J.).

[42] *St. Jude Medical Amendment Decision*, *supra* note 40 at paras. 32 and 37–38.