

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

 2004 CarswellNfld 105

Wheadon v. Bayer Inc.

PATRICK WHEADON, JEAN PARDY, BRUCE McCULLOUGH and JOHN RYAN (Plaintiffs) and BAYER INC.
(Defendant) and KIM COLEMAN (Intervenor)

Newfoundland and Labrador Supreme Court (Trial Division)

Barry J.

Heard: March 29-31, 2004; April 1, 2004
Judgment: April 19, 2004
Docket: 2002 01T 4246 CP

© Thomson Reuters Canada Limited or its Licensors. All rights reserved.

Counsel: Chesley Crosbie for Plaintiffs

David Eaton, Q.C., Peter J. Cavanagh for Defendant

Kevin F. Stamp, Q.C., Joel Rochon for Intervenor

Subject: Civil Practice and Procedure

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Plaintiffs brought action alleging personal injuries after being prescribed and using cholesterol drug "Baycol" distributed by defendant — Plaintiffs' action was for benefit of persons resident in Newfoundland and Labrador, and residents of Atlantic provinces who opt in, who were prescribed and ingested Baycol and who claimed personal injury as result, and persons who have derivative claim on account of family relationship with such claimant — Plaintiffs alleged that defendant knew or ought to have known that Baycol was unsafe and that defendant ought not to have marketed drug or ought to have recalled it sooner or ought to have provided more effective warnings — Plaintiffs applied for certification of action as class proceeding — Application granted — It was not plain and obvious from pleadings that action must fail — Plaintiffs pleaded action framed in negligence — Defendant accepted that plaintiffs have sufficiently pleaded cause of action.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Plaintiffs brought action alleging personal injuries after being prescribed and using cholesterol drug "Baycol" distributed by defendant — Plaintiffs' action was for benefit of persons resident in Newfoundland and Labrador, and

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

residents of Atlantic provinces who opt in, who were prescribed and ingested Baycol and who claimed personal injury as result, and persons who have derivative claim on account of family relationship with such claimant — Plaintiffs applied for certification of action as class proceeding — Application granted — Proposed class definition was proper and stated objective criteria by which members of class could be identified at outset of litigation — It was not necessary that every class member be named or known at outset but only that claim to membership in class be determinable by stated objective criteria — Over-inclusivity of class definition could not be established by bringing merits of litigation into determination of class membership — First identifying factor was prescription and ingestion of Baycol — First factor could be objectively determined and set clear boundary for class so that it was not unlimited and could be determined without reference to merits of action — Second identifying factor was claim of personal injury — Second factor was appropriate method of narrowing class to avoid over-inclusivity — Suggested class and subclasses were sufficiently numerous — Proposed representative plaintiffs fit within class definition.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Plaintiffs brought action alleging personal injuries after being prescribed and using cholesterol drug "Baycol" distributed by defendant — Plaintiffs' action was for benefit of persons resident in Newfoundland and Labrador, and residents of Atlantic provinces who opt in, who were prescribed and ingested Baycol and who claimed personal injury as result, and persons who have derivative claim on account of family relationship with such claimant — Plaintiffs alleged damage to muscle tissue and side effects, including conditions known as rhabdomyolysis, myopathy and myositis — Defendant contended that those side effects were common to all drugs in class called statins and that plaintiffs received adequate warnings — Plaintiffs applied for certification of action as class proceeding — Application granted — Plaintiffs satisfied evidentiary threshold by showing some basis in fact for commonality of certain issues — Common issues need not be dominant issues in litigation nor determinative of liability — Common issues would advance litigation in some meaningful way — Common issue was whether Baycol caused serious side effects and, if so, nature and extent of side effects — Another was whether Baycol was defective and/or unfit for its intended use — Another issue was whether defendant breached duty of care owed to class members and, if so, when and how — Another issue was whether defendant should pay punitive damages and, if so, to whom and amount.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Plaintiffs brought action alleging personal injuries after being prescribed and using cholesterol drug "Baycol" distributed by defendant — Plaintiffs' action was for benefit of persons resident in Newfoundland and Labrador, and residents of Atlantic provinces who opt in, who were prescribed and ingested Baycol and who claimed personal injury as result, and persons who have derivative claim on account of family relationship with such claimant — Plaintiffs applied for certification of action as class proceeding — Application granted — Judicial economy would be served because unnecessary duplication in fact-finding and legal analysis on common issues would be avoided — Common issues would not be finally determinative of liability but would advance interests of class — Common issues were not negligible in relation to individual issues — Access to justice would be promoted because aggregating claims would make it economic for all plaintiffs to pursue remedy against defendant — Behaviour modification would result because certification would help to ensure that defendant would be forced to internalize costs of any unlawful behaviour — Certification would promote behaviour modification of actual and potential wrongdoers — Rendering manufacturer of defective drug liable would create appropriate incentives for manufacture of safer drugs in future for benefit of whole society.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Fair and adequate representation

Plaintiffs brought action alleging personal injuries after being prescribed and using cholesterol drug "Baycol" distributed by defendant — Plaintiffs' action was for benefit of persons resident in Newfoundland and Labrador, and

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

residents of Atlantic provinces who opt in, who were prescribed and ingested Baycol and who claimed personal injury as result, and persons who have derivative claim on account of family relationship with such claimant — Proposed representative plaintiff W was prescribed Baycol in 1999, and stopped taking it after four months, all along complaining of pain — W resumed use in January 2000 and stopped taking Baycol in August 2001 after being advised that it was withdrawn from world market — W's intermittent muscle pain continued — M was prescribed Baycol in November 1999 in Nova Scotia and stopped taking it in June 2001 after complaining of pain — M currently resides in Newfoundland and continues to have pain — Plaintiffs applied for certification of action as class proceeding — Application granted — W and M were proper representative plaintiffs — Class Actions Act does not require claims of representative plaintiff to be typical of those of other class members — Prospect of individualized damage hearings does not preclude appointing representative plaintiff — It was premature to weigh merits of W's claim — W had common interest with other class members and would vigorously prosecute claim — Individual plaintiffs could opt out — Requirement in R. 7A.04(5) of Rules of the Supreme Court, 1986, for separate representative plaintiff for subclass of nonresidents was met by M.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Litigation plan

Plaintiffs brought action alleging personal injuries after being prescribed and using cholesterol drug "Baycol" distributed by defendant — Proposed representative plaintiff W produced litigation plan detailing steps needed to resolve litigation and provide notice to class — Plan set out proposals for publication of notice, opting out, management of documentary productions, discoveries, exchange of expert reports, ongoing case management, and assessment of damages — Plaintiffs applied for certification of action as class proceeding — Application granted — W's plan satisfied R. 7A.07 of Rules of the Supreme Court, 1986 and was consistent with litigation plans approved in other product liability class actions — Litigation plan need only provide reasonable framework for issues reasonably expected to arise — Case management could deal with matters such as individual issues that would arise in context of numerous and diverse injury claims, resources required to litigate claims, need for experts, examination for discovery issues, proposals for resolving individual issues, and manner of assessing damages or other forms of relief if liability was determined.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Miscellaneous considerations

Plaintiffs brought action alleging personal injuries including conditions known as rhabdomyolysis, myopathy, and myositis, after being prescribed and using defendant's cholesterol drug "Baycol" — Plaintiffs' action was for benefit of persons resident in Newfoundland and Labrador, and residents of Atlantic provinces who opt in, who were prescribed and ingested Baycol and who claimed personal injury as result, and persons who have derivative claim on account of family relationship with such claimant — Similar class actions were filed in five other provinces, three of which were settled subject to court approval — Pending Ontario settlement provided that it would become null and void if any other province made certification order before effective date of Ontario settlement — Plaintiffs applied for certification of action as class proceeding — Application granted — Plaintiffs satisfied requirements, however, certification was stayed until earlier of receipt of Ontario decision on approval of settlement agreement or May 31, 2004 — "Respectful cooperation" dictated that before finalizing certification order, this court should await Ontario developments — Proposed class in this action might have to be amended to exclude those who might benefit from Ontario settlement — Position of Ontario court on nullification clause may have to be considered in light of this court's responsibility under R. 7A.04(6)(b) of Rules of the Supreme Court, 1986 to ensure adequate representation in proceedings for residents of Newfoundland and Labrador.

Cases considered by *Barry J.*:

Always Travel Inc. v. Air Canada (2003), 43 C.B.R. (4th) 163, 235 F.T.R. 142, 2003 CFPI 707, 2003 CarswellNat 4358, 2003 FCT 707, 2003 CarswellNat 1763 (Fed. T.D.) — followed

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

Andersen v. St. Jude Medical Inc. [\(2003\), 38 C.P.C. \(5th\) 122, 67 O.R. \(3d\) 136, 2003 CarswellOnt 3478](#) (Ont. S.C.J.) — referred to

Bendall v. McGhan Medical Corp. [\(1993\), 16 C.P.C. \(3d\) 156, 14 O.R. \(3d\) 734, 106 D.L.R. \(4th\) 339, 1993 CarswellOnt 394](#) (Ont. Gen. Div.) — referred to

Bendall v. McGhan Medical Corp. [\(November 26, 1993\)](#), White J. (Ont. Gen. Div.) — referred to

Bittner v. Louisiana-Pacific Corp. [\(1997\), 1997 CarswellBC 2191, 43 B.C.L.R. \(3d\) 324](#) (B.C. S.C. [In Chambers]) — referred to

Bouchanskaia v. Bayer Inc. [\(2003\), 2003 BCSC 1306, 2003 CarswellBC 2059](#) (B.C. S.C.) — followed

Bywater v. Toronto Transit Commission [\(1998\), 1998 CarswellOnt 4645, 27 C.P.C. \(4th\) 172](#) (Ont. Gen. Div.) — referred to

Campbell v. Flexwatt Corp. [\(1997\), 1997 CarswellBC 2439, 98 B.C.A.C. 22, 161 W.A.C. 22, 15 C.P.C. \(4th\) 1, \[1998\] 6 W.W.R. 275, 44 B.C.L.R. \(3d\) 343](#) (B.C. C.A.) — referred to

Campbell v. Flexwatt Corp. [\(1998\), 228 N.R. 197 \(note\), 120 B.C.A.C. 80 \(note\), 196 W.A.C. 80 \(note\)](#) (S.C.C.) — referred to

Caputo v. Imperial Tobacco Ltd. [\(2004\), 2004 CarswellOnt 423, 236 D.L.R. \(4th\) 348, 42 B.L.R. \(3d\) 276](#) (Ont. S.C.J.) — considered

Carom v. Bre-X Minerals Ltd. [\(2000\), 2000 CarswellOnt 3838, 51 O.R. \(3d\) 236, 1 C.P.C. \(5th\) 62, 138 O.A.C. 55, 11 B.L.R. \(3d\) 1, 196 D.L.R. \(4th\) 344](#) (Ont. C.A.) — referred to

Carom v. Bre-X Minerals Ltd. [\(2001\), 2001 CarswellOnt 3609, 2001 CarswellOnt 3610, 283 N.R. 399 \(note\), 157 O.A.C. 399 \(note\)](#) (S.C.C.) — referred to

Chace v. Crane Canada Inc. [\(1997\), 1997 CarswellBC 2832, 14 C.P.C. \(4th\) 197, 164 W.A.C. 32, 101 B.C.A.C. 32, 44 B.C.L.R. \(3d\) 264](#) (B.C. C.A.) — referred to

Dalhuisen (Guardian ad litem of) v. Maxim's Bakery Ltd. [\(2002\), 2002 BCSC 528, 2002 CarswellBC 836](#) (B.C. S.C. [In Chambers]) — referred to

Endean v. Canadian Red Cross Society [\(1997\), 148 D.L.R. \(4th\) 158, 1997 CarswellBC 1251, 11 C.P.C. \(4th\) 368, 37 C.C.L.T. \(2d\) 242, 36 B.C.L.R. \(3d\) 350, \[1997\] 10 W.W.R. 752](#) (B.C. S.C.) — referred to

Fakhri v. Alfalfa's Canada Inc. [\(2003\), 2003 BCSC 1717, 2003 CarswellBC 2816, 41 C.P.C. \(5th\) 369](#) (B.C. S.C.) — referred to

Gariepy v. Shell Oil Co. [\(2002\), 2002 CarswellOnt 2270, 23 C.P.C. \(5th\) 360](#) (Ont. S.C.J.) — referred to

Harrington v. Dow Corning Corp. [\(2000\), 2000 BCCA 605, 2000 CarswellBC 2183, 82 B.C.L.R. \(3d\) 1, \[2000\] 11 W.W.R. 201, 47 C.P.C. \(4th\) 191, 193 D.L.R. \(4th\) 67, 2 C.C.L.T. \(3d\) 157, 144 B.C.A.C. 51, 236 W.A.C. 51](#)

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

(B.C. C.A.) — referred to

Hollick v. Metropolitan Toronto (Municipality) (2001), (sub nom. *Hollick v. Toronto (City)*) 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, (sub nom. *Hollick v. Toronto (City)*) 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City)*) 56 O.R. (3d) 214 (headnote only), 24 M.P.L.R. (3d) 9, 277 N.R. 51, 13 C.P.C. (5th) 1, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279, (sub nom. *Hollick v. Toronto (City)*) [2001] 3 S.C.R. 158 (S.C.C.) — followed

Hoy v. Medtronic Inc. (2001), 2001 BCSC 1343, 94 B.C.L.R. (3d) 169, 12 C.P.C. (5th) 370, 2001 CarswellBC 3286 (B.C. S.C. [In Chambers]) — referred to

Hoy v. Medtronic Inc. (2003), 183 B.C.A.C. 165, 301 W.A.C. 165, 2003 BCCA 316, 2003 CarswellBC 1290, 14 B.C.L.R. (4th) 32, [2003] 7 W.W.R. 681 (B.C. C.A.) — referred to

Kumar v. Mutual Life Assurance Co. of Canada (2001), 2001 CarswellOnt 4449, (sub nom. *Williams v. Mutual Life Assurance Co. of Canada*) 152 O.A.C. 344, [2002] I.L.R. I-4052, 17 C.P.C. (5th) 103, 34 C.C.L.I. (3d) 316 (Ont. Div. Ct.) — referred to

Morguard Investments Ltd. v. De Savoye (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077, 1990 CarswellBC 283, 1990 CarswellBC 767 (S.C.C.) — followed

Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 127 D.L.R. (4th) 552, 40 C.P.C. (3d) 245, 25 O.R. (3d) 331, 1995 CarswellOnt 994 (Ont. Gen. Div.) — referred to

Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 40 C.P.C. (3d) 263, 129 D.L.R. (4th) 110, 25 O.R. (3d) 331 at 347, 1995 CarswellOnt 995 (Ont. Gen. Div.) — referred to

Olsen v. Behr Processing Corp. (2003), 17 B.C.L.R. (4th) 315, 2003 BCSC 1252, 2003 CarswellBC 1976 (B.C. S.C. [In Chambers]) — referred to

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 1999 CarswellOnt 1851, 46 O.R. (3d) 130, 37 C.P.C. (4th) 175 (Ont. S.C.J.) — referred to

Pardy v. Bayer Inc. (2003), 35 C.P.C. (5th) 185, 229 Nfld. & P.E.I.R. 242, 679 A.P.R. 242, 2003 NLSCTD 109, 2003 CarswellNfld 182 (N.L. T.D.) — referred to

Pardy v. Bayer Inc. (2003), 2003 NLCA 45 (Nfld. C.A.) — referred to

Pardy v. Bayer Inc. (2003), 230 Nfld. & P.E.I.R. 325, 682 A.P.R. 325, 2003 NLSCTD 130, 2003 CarswellNfld 218, 42 C.P.C. (5th) 362 (N.L. T.D.) — referred to

Queen v. Cognos Inc. (1993), 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169, 1993 CarswellOnt 801, 1993 CarswellOnt 972 (S.C.C.) — referred to

Reid v. Ford Motor Co. (2003), 2003 BCSC 1632, 2003 CarswellBC 2672 (B.C. S.C.) — referred to

Rumley v. British Columbia (2001), 2001 SCC 69, 2001 CarswellBC 2166, 2001 CarswellBC 2167, 9 C.P.C. (5th)

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

[1, 205 D.L.R. \(4th\) 39, \[2001\] 11 W.W.R. 207, 95 B.C.L.R. \(3d\) 1, 157 B.C.A.C. 1, 256 W.A.C. 1, 275 N.R. 342, 10 C.C.L.T. \(3d\) 1, \[2001\] 3 S.C.R. 184](#) (S.C.C.) — followed

Samos Investments Inc. v. Pattison [\(2001\), 2001 BCSC 1790, 2001 CarswellBC 2989, 22 B.L.R. \(3d\) 46](#) (B.C. S.C.) — referred to

Taub v. Manufacturers Life Insurance Co. [\(1998\), 40 O.R. \(3d\) 379, 1998 CarswellOnt 5216](#) (Ont. Gen. Div.) — referred to

Western Canadian Shopping Centres Inc. v. Dutton [\(2001\), 94 Alta. L.R. \(3d\) 1, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, \(sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*\) 201 D.L.R. \(4th\) 385, 272 N.R. 135, 8 C.P.C. \(5th\) 1, \[2002\] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, \[2001\] 2 S.C.R. 534](#) (S.C.C.) — considered

Williams v. Mutual Life Assurance Co. of Canada [\(2000\), 2000 CarswellOnt 3739, 51 O.R. \(3d\) 54, \[2001\] I.L.R. I-3896, 24 C.C.L.I. \(3d\) 298](#) (Ont. S.C.J.) — referred to

Wilson v. Servier Canada Inc. [\(2000\), 2000 CarswellOnt 3257, 50 O.R. \(3d\) 219, 49 C.P.C. \(4th\) 233](#) (Ont. S.C.J.) — followed

Wilson v. Servier Canada Inc. [\(2000\), 143 O.A.C. 279, 2000 CarswellOnt 4399, 52 O.R. \(3d\) 20](#) (Ont. Div. Ct.) — referred to

Statutes considered:

Class Actions Act, S.N. 2001, c. C-18.1

Generally — referred to

s. 5(1) — considered

s. 5(1)(a) — referred to

s. 5(1)(b) — referred to

s. 5(1)(c) — referred to

s. 5(1)(d) — referred to

s. 5(1)(e) — considered

s. 5(1)(e)(ii) — considered

s. 5(1)(e)(iii) — considered

s. 6(1) — referred to

s. 6(2) — referred to

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

Food and Drugs Act, R.S.C. 1985, c. F-27

Generally — referred to

Rules considered:

Rules of the Supreme Court, 1986, S.N. 1986, c. 42, Sched. D

R. 7A.01(4) [en. Nfld. Reg. 26/02] — referred to

R. 7A.04(2) [en. Nfld. Reg. 26/02] — referred to

R. 7A.04(5) [en. Nfld. Reg. 26/02] — referred to

R. 7A.04(6) [en. Nfld. Reg. 26/02] — considered

R. 7A.04(6)(b) [en. Nfld. Reg. 26/02] — referred to

R. 7A.07 [en. Nfld. Reg. 26/02] — referred to

Words and phrases considered

MYALGIAMYOPATHYRHABDOMYOLYSISSTATINS

Myalgia is the medical term for general muscle aches and pains. It is a symptom and not an underlying medical condition. Most reports of myalgia are not drug related, although there is a myriad of prescription drugs that include muscle ache or pain as a reported side effect. Myalgia has no lasting effect on the patient. Myopathy is a rare potential side effect of all statins. It is an underlying medical condition - a disease of muscles. It can result from many causes other than the use of statins. The most serious form of myopathy is rhabdomyolysis, a rare but well-documented syndrome [the defendant] defines as muscle symptoms (generalized muscle aches and weakness) accompanied by creatine kinase ("CK") levels at or over ten times the upper limit of normal, elevated creatinine and usually with brown urine and the presence of urinary myoglobin. Rhabdomyolysis can be caused by any statin. [. . .] The clinical presentation of rhabdomyolysis includes fever, generalized weakness, malaise, pain, swelling and tenderness at the extremities, and dark (typically brown) urine. Patients may have a variety of characteristics that predispose them to rhabdomyolysis, which are well known to physicians. [. . .] The treatment of rhabdomyolysis includes cessation of the precipitating drug, rapid hydration and diuretic therapy. Some patients may require dialysis for a short period of time. Most patients recover completely within a few days. However, if not recognized promptly and treated properly, rhabdomyolysis can lead to kidney failure which might ultimately be fatal. [. . .] Concomitant therapy with statins and certain other prescription drugs, including fibrates (such as gemfibrozil), is associated with an increased risk of rhabdomyolysis. As a result, all statins and fibrates carry a warning regarding the risk of rhabdomyolysis, both in monotherapy and in co-prescription. Patients with high cholesterol are at increased risk of both coronary heart disease and stroke. Doctors frequently recommend non-pharmacological therapy, such as diet, increased aerobic exercise, smoking cessation, and weight loss to reduce cholesterol levels, thereby reducing the risk of coronary heart disease and stroke. Where these are unsuccessful, physicians may prescribe statin therapy. Statins are pharmaceutical drugs that act as cholesterol-lowering agents and are widely used in clinical practice. Statins work by interrupting the cholesterol synthesis process in the liver and increasing the dose of a statin will increase the reduction of cholesterol in the blood. [. . .] Non-serious adverse reactions reported by patients taking statins include headaches, fatigue, mild gastro-intestinal distress, itching, inflammation of the throat or nasal passages, sinusitis and photosensitivity. [. . .] [. . .]

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

]All statins are associated with muscle side effects.

APPLICATION for certification of action as class proceeding.

Barry J.:

1 The Plaintiffs claim that Baycol, a cholesterol-lowering drug distributed by Bayer Inc., was defective and unfit for human consumption. Baycol was withdrawn from Canadian and world markets on August 8, 2001, amid mounting reports of serious side effects and deaths. The Plaintiffs allege they suffered personal injury after being prescribed the drug and consuming it. They now apply for certification of their action as a class proceeding.

A. THE FACTS

2 As will be seen below, the parties to this action differ significantly on the facts. The following attempts to provide a factual background as context for the issues raised by this application. I do not intend to make findings on the merits at this stage.

Actions in other jurisdictions

3 The present action is for the benefit of the residents of this Province, and, if certified, may also include the residents of the other provinces of Atlantic Canada on an opt-in basis.

4 Similar Baycol class actions have been filed in every Canadian province which allows class actions, namely Quebec, Ontario, Manitoba, Saskatchewan, and British Columbia.

5 The British Columbia Supreme Court has certified a Baycol class action for the residents of that province. That action certified the claims of all B.C. residents who took Baycol, regardless of the type of injury they claim to have suffered as a result. [\[FN1\]](#)

6 Settlements have been reached in Ontario, Quebec and British Columbia, subject to court approval.

7 The Ontario action has not been certified, but would be certified as a national class action by consent (British Columbia and Quebec excepted), pursuant to a settlement agreement dated January 8, 2004. On April 21, 2004, the Ontario Court will hear an application for approval of the settlement.

8 The Ontario action, when originally filed, claimed to cover all persons in Canada injured by Baycol, and all types of injury related to Baycol.

9 The Ontario argument now aims to settle only one form of injury related to Baycol (rhabdomyolysis by defined criteria). It would abandon all other claims by all other potential class members and seeks their dismissal. Paragraph 12 of the draft order attached to the Ontario agreement reads:

. . . Plaintiffs' class counsel have agreed that the Ontario Court should dismiss the motion for certification . . . to the extent that such motions have been brought on behalf of persons who purchased and/or ingested Baycol but who did not suffer from Rhabdomyolysis contemporaneously with their ingestion of Baycol and persons making claims derivative thereto.

10 By paragraph 15 of the Ontario agreement and proposed Order:

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

Bayer intends that this Settlement Agreement shall be binding on all persons resident in Canada . . . Certification of a national class (excepting Quebec and British Columbia) shall be sought in the Ontario Court based on the substantial connections between the claims made in the Ontario Action and the Province of Ontario . . . for the limited purpose of giving effect to this Settlement Agreement.

11 The Ontario agreement would result in the dismissal of the certification claim on behalf of the class of all those personally injured by Baycol, and the substitution by consent of a far narrower certified class.

12 For example, Wheadon, a proposed representative Plaintiff in the Newfoundland action, claims to have been afflicted with rhabdomyolysis, but arguably is excluded from compensation under the Ontario agreement because his doctor neither performed the appropriate blood test nor recorded a contemporaneous diagnosis of rhabdomyolysis, as demanded by the Ontario agreement's definition of rhabdomyolysis found in clause 1(ff):

"Rhabdomyolysis" means skeletal muscle symptoms (generalized and progressive pain and weakness) accompanied by a marked elevation in creatine kinase ("CK") level (typically substantially greater than ten times the upper limit of normal and in no event less than 1,000) usually with brown urine and urinary myoglobin and sometimes with creatinine elevation, or in exceptional cases, in the absence of a CK test, where other objective and documented indicia of rhabdomyolysis are shown to have been present and there was a medical diagnosis of rhabdomyolysis contemporaneous with ingestion of Baycol and the observation and documentation of such objective indicia of rhabdomyolysis.

13 *Of the 25 class members who have retained counsel in this province (another 30 approximately have contacted counsel since this proceeding commenced), only one, in the opinion of counsel, would qualify for payment under the Ontario agreement. That payment would be \$10,000.*

14 Counsel in this proceeding accept that the payments offered to those qualified to receive them under the Ontario deal are reasonable, and have recommended to the client who qualifies that she accept. It is the restrictive nature of the rhabdomyolysis definition and the abandonment of all other personally injured claimants, to which the Plaintiffs object.

15 By the terms of one clause of the Ontario agreement, "if an order is made by a Court of any other province (other than British Columbia) certifying an action against . . . Bayer Inc. . . . in respect of Baycol as a class proceeding prior to the Effective Date" the agreement is "null and void".

Nature of the Action

16 The Plaintiffs allege Baycol caused damage to muscle tissue, resulting in serious and potentially debilitating side effects, including conditions known as rhabdomyolysis, myopathy and myositis. Bayer does not deny this but says the side effects are common to all drugs in the class called statins and the plaintiffs received adequate warnings.

17 The Plaintiffs allege that Baycol was defective and should never have been marketed. They say there are core issues of negligence in this case which are common to the claims of all class members. These include: Was Baycol unsafe? What did the Defendant know about the safety of Baycol and when? Was the Defendant negligent in its decisions to market Baycol and in its failure to recall it sooner? The proposed common issues in this action are as follows:

(i) Whether Baycol causes serious side effects, and if so, the nature and extent of those side effects?

(ii) Was Baycol defective and/or unfit for its intended use?

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

- (iii) Was the Defendant negligent and, if so, when and how?
- (iv) Did the Defendant owe a duty of care to the Class members?
- (v) Did the Defendant breach the standard of care expected of it and, if so, when and how?
- (vi) Should the Defendant pay punitive damages, and if so, to whom should they be paid, and in what amount?

18 The Plaintiffs have proposed that the following class be certified:

- (i) Persons resident in Newfoundland and Labrador who were prescribed and ingested Baycol and who claim personal injury as a result ("Provincial Class");
- (ii) Persons who have a derivative claim on account of a family relationship with a person in (i) ("Provincial Family Class");
- (iii) Persons resident in Nova Scotia, New Brunswick, and Prince Edward Island who were prescribed and ingested Baycol, who claim personal injury as a result, and opt-in to this proceeding ("Atlantic Class");
- (iv) *Persons who have a derivative claim on account of a family relationship with a person in (iii) who opt-in to this proceeding ("Atlantic Family Class").*

Statement of Claim

19 The Statement of Claim alleges that the Defendant knew or ought to have known that Baycol was defective. It alleges, among other things, that:

- (a) Baycol was minimally efficacious in lowering cholesterol when compared with other, safer statin drugs;
- (b) to combat problems of efficacy the Defendant proceeded to market ever higher dosages of Baycol, which compounded the risks caused by the drug;
- (c) the Defendant's clinical studies prior to marketing the drug were inadequate;
- (d) the Defendant failed to appreciate data from clinical trials with patients who ingested Baycol, which revealed elevated enzymes levels, a precursor to rhabdomyolysis; and
- (e) beginning in 1998 the Defendant began to receive reports of death from rhabdomyolysis in patients taking Baycol but failed to take proper and prompt action to warn class members or recall the drug.

Witnesses

20 The Plaintiffs have filed affidavits from three witnesses: Patrick Wheadon, the proposed representative Plaintiff for the Provincial classes; Bruce McCullough, a named Plaintiff and putative class member and proposed representative Plaintiff for the Atlantic Provinces classes; and Douglas Lennox, a solicitor. The Defendant has also filed affidavits from three witnesses: Manoj Saxena and Douglas Grant, employees of the Defendant, and Dr. Lawrence Leiter, a medical specialist and consultant to the Defendant. Only Wheadon and McCullough have been cross-examined. The

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

evidence of the witnesses may be summarized as follows.

Patrick Wheadon

21 Wheadon is a resident of Western Bay, Newfoundland. He is 57 years old. He is trained as a bricklayer and runs a small contracting business. He was prescribed and ingested Baycol at its maximum strength of .8 mg, together with another prescription medicine, Gemfibrozil, a fibrate. Wheadon alleges that he suffered personal injury including rhabdomyolysis as a result of his consumption of Baycol. He reports suffering severe muscle pain following his consumption of the drug.

22 On cross-examination at discovery, Wheadon stated that:

- (i) He was prescribed Gemfibrozil in February, 1997;
- (ii) He was prescribed Baycol in May, 1999;
- (iii) Within three or four days of starting Baycol, he experienced muscle pain and reported it to his doctor;
- (iv) In August of 1999, he stopped taking Baycol and was prescribed another statin, Lipitor;
- (v) In January, 2000 he was again prescribed Baycol and, at that time, complained to his doctor of ongoing muscle pains;
- (vi) He stopped taking Baycol only after his doctor told him it had been withdrawn from the market in August, 2001;
- (vii) He has ongoing, intermittent, muscle pain to the present day;
- (viii) He was hospitalized for "pancreas attacks" while on Baycol;
- (ix) He is not familiar with the term rhabdomyolysis;
- (x) He is unable to provide particulars of his medical history;
- (xi) He refuses to produce his medical records at this point in the proceedings.

23 Bayer argues that because the muscle symptoms reported by Wheadon continued after he stopped taking Baycol, they cannot have been caused by Baycol, which according to Bayer is quickly metabolized and excreted by the body, usually within a few hours. In cases where the myalgia is truly statin-related, it disappears promptly on discontinuation of the statin, says Bayer. Myalgia that does not resolve after statin therapy is stopped in Bayer's view is not caused by the statin. There are many other causes of myalgia, most of which are not drug related. Bayer complains that Wheadon's refusal to provide his medical records prevents an assessment being made of the true cause of his myalgia.

Bruce McCullough

24 Bruce McCullough is currently a resident of St. John's, Newfoundland. He also was prescribed Baycol and consumed it at its maximum dose, .8 mg. Like Wheadon, McCullough describes suffering severe muscle pain and injury while on Baycol. He states:

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

. . . I was having pains in my legs, knees and hips and back. It was so intolerable I couldn't get up and down out of a chair by myself

25 On cross-examination, McCullough stated:

- (i) He was prescribed Baycol in November, 1999, in Nova Scotia;
- (ii) He was initially prescribed a dose of 0.2 mg, which he took twice a day;
- (iii) While on this initial dose, he complained to his physician of pain in his legs, knees, hips and back;
- (iv) Despite his complaints, his dose of Baycol was increased to 0.8 mg/day;
- (v) He stopped taking Baycol in June, 2001;
- (vi) At some time between November, 1999 and June, 2001 he may also have taken another prescription statin, Zocor;
- (vii) He has not received a diagnosis in respect of his complaints;
- (viii) He continues to suffer from pain and weakness in his legs, back and arms to the present time.
- (ix) He refuses to produce his medical records at this point in the proceedings.

26 The Statement of Claim asserts that Jean Pardy and John Ryan also continue to suffer muscle effects from taking Baycol.

27 Bayer argues that because the muscle symptoms reported by Wheadon, McCullough, Ryan and Pardy continued after they stopped taking Baycol, they cannot have been caused by Baycol and the Plaintiffs have failed to put forward a colourable claim against the Defendant.

Douglas Lennox

28 Douglas Lennox is an Ontario solicitor assisting Newfoundland counsel with this action. His affidavit provides background to this litigation, attaching as exhibits documents published by Health Canada and the Defendant concerning the withdrawal of Baycol from Canadian markets.

29 The Lennox affidavit further attaches a summary of adverse drug reaction reports received by Health Canada concerning Baycol as of August 30, 2001. The Health Canada document lists 94 reports of Canadians suffering rhabdomyolysis, myalgia, myositis, muscle pain, renal failure, elevated CPK levels, and other adverse reactions after taking Baycol.

30 Lennox deposes that even in the absence of any official notice of this class action proposed Class Counsel have already been contacted by 25 individuals from Newfoundland and Labrador and the other Atlantic provinces with respect to this action (as noted above, this number has increased since the deposition). Class Counsel currently believe that only one of these class members may be eligible for compensation under the Ontario agreement.

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

31 The Lennox affidavit goes on to describe the Plaintiffs' theory of this litigation. The affidavit describes allegations that the Plaintiffs would likely have to prove and common defences that they would likely have to overcome to succeed at a common issues trial.

32 The affidavit attaches a Health Canada report which the Plaintiffs say indicates that the rate of adverse reactions reported in Canada was much higher for Baycol than for other statin drugs. The Plaintiffs submit the report indicates that Health Canada received 54 reports of rhabdomyolysis related to Baycol even though Baycol was on the market for only 3 and half years. In contrast, Health Canada received only 12 such reports for Mevacor, a product which has been on the market for 15 years, and only 3 such reports for Pravachol, a product which has been on the market in Canada for 13 years. The report concludes:

The continued scrutiny of postmarketing reports of rhabdomyolysis, including related deaths, has revealed an increased reporting rate of rhabdomyolysis with Baycol than with other statins, especially when gemfibrozil is prescribed concurrently.

33 Lennox attaches a Litigation Plan which describes the Plaintiffs' proposal for managing this class action to its completion. The Plan contemplates that there will be individual issues remaining if the Plaintiffs win a common issues trial. The Litigation Plan sets out the Plaintiffs' proposals for publication of notice, opting out, management of documentary productions, discoveries, exchange of expert reports, ongoing case management, and assessment of damages.

Manoj Saxena

34 Saxena is the Director of Regulatory Affairs for the Defendant. Saxena deposes that the defendant conducted clinical trials for Baycol in Canada prior to marketing the drug. He testifies that it is his "understanding" that rhabdomyolysis was not reported by clinical investigators during clinical trials.

35 The Plaintiffs submit that the issue of whether the Defendant's clinical trials of Baycol were adequate cannot be resolved on a certification motion and that Saxena's "understanding" does not resolve this question. The Plaintiffs allege that trials were inadequate and that the Defendant was negligent in failing to appreciate the significance of elevated CPK levels, a precursor to muscle damage, during those clinical trials. The Plaintiffs argue the question of the Defendant's alleged negligence can only be resolved at trial, after the pleadings are closed and the Plaintiffs have had a chance to conduct examinations for discovery.

36 Saxena then describes the Defendant's communications with Health Canada. He testifies that the Defendant submitted 277 volumes of information to Health Canada in obtaining regulatory approval for the sale of Baycol.

37 The Plaintiffs submit whether the Defendant was negligent in its communications with Health Canada, thereby causing foreseeable damage to class members, is a live issue in this lawsuit and cannot be resolved on a class certification motion. They say this is an issue that can only be resolved at trial, following discoveries, at which time the Plaintiffs may review the 277 volumes referred to by Mr. Saxena. The Plaintiffs assert that, even if the Defendant provided Health Canada with adequate information, this would still not relieve the Defendant of its other common law duties to the Plaintiff class, since a drug can still be defective even if approved by a regulator.

38 Saxena describes the withdrawal of Baycol as "voluntary". He attributes the reason for the withdrawal to doctors co-prescribing gemfibrozil. The Plaintiffs disagree with these characterizations by the Defendant of its conduct. The Plaintiffs note that there was mounting pressure on Bayer from European regulators prior to its "voluntary" withdrawal. As of July 2001, the European Medicine Evaluation Agency had publicized that it was investigating Baycol. The Plaintiffs submit that if the Defendant had not voluntarily withdrawn its drug from worldwide markets, a compulsory recall would soon have been ordered by regulators.

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

Dr. Lawrence Leiter

39 Dr. Leiter is a medical specialist and a consultant for the Defendant. He provides some background information on Baycol, statin drugs, rhabdomyolysis, myositis and myalgia. The Plaintiffs do not disagree with Dr. Leiter's statements that whether a patient had suffered an injury from Baycol would require an assessment of the patient's individual circumstances. They say the Plaintiffs' Litigation Plan proposes exactly that following a successful common issues trial.

40 The Plaintiffs submit, however, that a number of Dr. Leiter's statements are contentious and cannot be resolved on a class certification motion; for example, his opinion that "Baycol was medically efficacious." The Plaintiffs have specifically pleaded that it was not.

41 Dr. Leiter compares Baycol with other statins. He writes:

As a class, statins are generally well tolerated, with adverse reactions that are mild and transient. Most statins have similar adverse reactions and warnings.

42 The Plaintiffs have specifically pleaded that Baycol is not like the other statins. They claim the fact that Baycol was withdrawn and the others were not appears to confirm this, as does the Health Canada report comparing the number of adverse reactions from Baycol with the other statins.

43 The Plaintiffs further disagree with the suggestion in Dr. Leiter's affidavit that injuries caused by Baycol may not be serious or may be transient or that patients injured by Baycol may recover quickly. The Plaintiffs have pleaded that they have suffered personal injuries and say they will seek to prove the extent of those injuries at individual damage hearings following a successful common issues trial.

44 The Plaintiffs note that while Dr. Leiter's evidence may be of relevance at a common issues trial, where the trial court may consider the credibility of this witness and consider the credibility of contrasting expert opinion from the Plaintiffs, the contentious matters relating to the merits of the action in Dr. Leiter's affidavit cannot be resolved on a class certification motion.

Douglas Grant

45 Grant is the Vice-President, Public Policy and Communications of the Defendant. Grant testifies that the Defendant has received 179 reports of serious adverse reactions from Canadians who took Baycol.

46 It is the Plaintiffs' position that the actual number of Canadians with adverse reactions may be higher as Canada's voluntary reporting system for such reactions may tend to underestimate the total number of cases. Specifically, Health Canada advises that:

Only a small proportion of suspected adverse reactions are reported to the program, consequently this information must not be used to estimate the incidence of adverse reactions.

47 Grant deposes that Bayer has been publicly willing to settle certain injury cases related to Baycol since at least March 2003.

Distribution of Baycol in Canada

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

48 Bayer distributed Baycol in Canada for three and a half years, from March 1998 to August 2001, with the regulatory approval of Health Canada.

49 Bayer is a wholly-owned subsidiary of Bayer A.G., the manufacturer of Baycol. Bayer says it neither designed nor manufactured Baycol and had no role in its design or preclinical development.

50 Baycol was jointly promoted in Canada by Bayer and Fournier Pharma, Inc. ("Fournier"). Both Bayer and Fournier had sales representatives in Newfoundland and the Atlantic provinces who communicated with physicians, and occasionally pharmacists, respecting Baycol. Most physicians would have been called upon by sales representatives from both companies.

51 Baycol was available only as prescribed by physicians. Bayer did not sell Baycol directly to patients.

Lipid Disorders and Statin Therapy - Bayer's Position

52 Patients with high cholesterol are at increased risk of both coronary heart disease and stroke. Doctors frequently recommend non-pharmacological therapy, such as diet, increased aerobic exercise, smoking cessation, and weight loss to reduce cholesterol levels, thereby reducing the risk of coronary heart disease and stroke. Where these are unsuccessful, physicians may prescribe statin therapy. Statins are pharmaceutical drugs that act as cholesterol-lowering agents and are widely used in clinical practice. Statins work by interrupting the cholesterol synthesis process in the liver and increasing the dose of a statin will increase the reduction of cholesterol in the blood.

53 Baycol (generically named cerivastatin) is a statin. It was one of six statins available for sale by prescription in Canada in 1998. Bayer submits that Baycol was medically efficacious and the vast majority of patients taking Baycol benefited in the form of reduced cholesterol levels, without ill effect.

54 Bayer also says that the efficacy and tolerability of statins may be quite different in one patient than another and that some patients were able to tolerate Baycol who were unable to tolerate any other statin.

Side Effects Associated with Statins - Bayer's Position

55 Bayer submits statins have proven to be safe and have been used in millions of patients over the past fifteen years to decrease coronary heart disease and total mortality, and to reduce myocardial infarctions and the need for patients to undergo revascularization procedures to reduce stroke and peripheral vascular diseases. Like prescription drugs generally, statins are associated with potential side effects. Bayer says adverse reactions to statins are generally mild and transient. Statins are prescribed to patients despite known side effects because, in the opinion of their individual physician, the anticipated or observed benefits outweigh the risks to the patient.

Non-Muscle Side Effects Associated with Statins - Bayer's Position

56 Non-serious adverse reactions reported by patients taking statins include headaches, fatigue, mild gastro-intestinal distress, itching, inflammation of the throat or nasal passages, sinusitis and photosensitivity. Bayer says it is difficult to attribute such complaints to the use of statins since clinical trials gave rise to the same complaints in association with the use of placebos.

57 Non-muscle related side effects that were reported to Health Canada in association with Baycol extend to a list of more than fifty diverse and unrelated complaints. Health Canada warns that the accuracy of these reports has not been scientifically or otherwise verified.

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

58 A similar range of non-muscle side effects were reported to Health Canada in association with Atorvastatin ("Lipitor") and in clinical trials in association with placebos.

Muscle Side Effects Associated with Statins - Bayer's Position

59 All statins are associated with muscle side effects.

60 Myopathy is a rare potential side effect of all statins. It is an underlying medical condition - a disease of muscles. It can result from many causes other than the use of statins. Bayer says statin-induced myopathy typically resolves within a few days after use of the statin ceases, without hospitalization or other medical intervention and without serious or permanent effects.

Rhabdomyolysis - Bayer's Position

61 The most serious form of myopathy is rhabdomyolysis, a rare but well-documented syndrome Bayer defines as muscle symptoms (generalized muscle aches and weakness) accompanied by creatine kinase ("CK") levels at or over ten times the upper limit of normal, elevated creatinine and usually with brown urine and the presence of urinary myoglobin.

62 Rhabdomyolysis can be caused by any statin. Bayer asserts, however, it is more commonly caused by alcohol, cocaine or opiate abuse, viral infection, trauma, extreme physical exertion and other causes. The clinical presentation of rhabdomyolysis includes fever, generalized weakness, malaise, pain, swelling and tenderness at the extremities, and dark (typically brown) urine. Patients may have a variety of characteristics that predispose them to rhabdomyolysis, which are well known to physicians.

63 Bayer says rhabdomyolysis that is identified and treated appropriately is reversible and will not result in any permanent damage. The treatment of rhabdomyolysis includes cessation of the precipitating drug, rapid hydration and diuretic therapy. Some patients may require dialysis for a short period of time. Most patients recover completely within a few days. However, if not recognized promptly and treated properly, rhabdomyolysis can lead to kidney failure which might ultimately be fatal.

64 There were reports of two deaths of patients in Canada reported as suffering from rhabdomyolysis in association with Baycol. There have also been reports in Canada of deaths of patients suffering from rhabdomyolysis in association with other statins.

65 Concomitant therapy with statins and certain other prescription drugs, including fibrates (such as gemfibrozil), is associated with an increased risk of rhabdomyolysis. As a result, all statins and fibrates carry a warning regarding the risk of rhabdomyolysis, both in monotherapy and in co-prescription.

Other Muscle Side Effects - Bayer's Position

66 Myalgia is the medical term for general muscle aches and pains. It is a symptom and not an underlying medical condition. Most reports of myalgia are not drug related, although there is a myriad of prescription drugs that include muscle ache or pain as a reported side effect. Myalgia has no lasting effect on the patient. In controlled trials, the incidence of complaints of myalgia was similar for placebo and for statins, which in Bayer's view suggests that myalgia is not caused by statins.

67 Based on the clinical experience of numerous physicians, and reports in medical literature, Bayer submits the vast majority of patients taking Baycol have benefited by reducing their cholesterol levels. An extremely small percentage

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

of patients are reported to have suffered rhabdomyolysis.

68 Bayer says that from a medical point of view, in order to determine whether any injury reported by a Baycol patient could be causally connected with Baycol, it would be necessary, among other things, to examine the individual circumstances of that patient, to review his or her medical history (including his or her pharmacological history and history of other medical conditions) and to review complete medical records, including records of kidney functions tests, baseline CK tests and subsequent CK tests and myoglobin measurements.

69 It would also be necessary to determine from medical records when the complaint was made relative to the commencement and discontinuation of therapy on Baycol, and to assess all documentation that suggests a temporal relationship between Baycol and the complaint made. Such an assessment would have to be conducted on a case-by-case basis for each reported injury.

70 Bayer claims there is no residual effect from Baycol, it is quickly metabolized and excreted by the body, usually within a few hours, and a patient will not develop any side effects after use of Baycol has stopped.

Evidence Regarding Muscle Side Effects of Baycol - Bayer's Position

71 The Plaintiffs have alleged in their Statement of Claim that Baycol caused rhabdomyolysis and the associated symptom of muscle weakness "much more frequently and with greater severity" than other statins. Bayer notes the Plaintiffs have not offered any evidence to suggest that Baycol caused any side effects other than rhabdomyolysis with greater frequency or severity than other statins. On the contrary, says Bayer, the Plaintiffs' own evidence indicates that Baycol was not associated with a higher reporting rate of any side effects other than rhabdomyolysis.

Warnings and Contraindications - Bayer's Position

72 Bayer says from the outset, it provided clear warnings of the risks and side effects associated with Baycol based on its knowledge of those risks and side effects at the time the warnings were given and in accordance with Health Canada's requirements and the regulations under the *Food and Drugs Act*, R.S.C. 1985, c. F-27.

Warnings of Rhabdomyolysis - Bayer's Position

73 From the first day that Baycol was marketed in Canada, Bayer's Product Monograph (approved by Health Canada) warned of the risk of rhabdomyolysis with statin therapy. The Product Monograph included a Patient Information Sheet, distributed with all sample product and intended to be distributed to patients who were prescribed Baycol. In its first Patient Information Sheet, Bayer warned, "although most people do not have a problem with side effects when taking Baycol, all medications can cause unwanted side effects". Bayer specifically warned patients to tell their physician if they were taking gemfibrozil and to report "right away" any unexplained muscle pain, tenderness, soreness or weakness.

Warnings of Other Muscle Side Effects - Bayer's Position

74 From the outset, Bayer's Product Monograph for Baycol also warned of the risk of muscle side effects with Baycol. In particular, Bayer warned of muscle aching and weakness, myopathy, muscle cramps, arthralgias and myalgia.

75 The Product Monographs for other statins contain similar warnings.

Warnings of Non-Muscle Side Effects - Bayer's Position

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

76 Bayer's Product Monograph also warned of the risk of other non-muscle side effects of Baycol ranging from depression to neuropathy and of the risk of a series of hypersensitivity reactions.

77 The Product Monographs for other statins contain similar warnings.

78 Bayer says that, following the launch of Baycol in Canada, Bayer informed Health Canada of all reports it received of rhabdomyolysis and other adverse events by filing adverse event reports. As information from post-marketing observations became available, Bayer sought and obtained approval from Health Canada to amend Baycol's Product Monograph so that the warnings grew stronger and were more specific over time.

79 All statements made by Bayer about Baycol were strictly proscribed by the Code of Advertising Acceptance of the Pharmaceutical Advertising Advisory Board. The Code prohibits use of materials that are not consistent with the approved Product Monograph. The Code mandates that all clinical and therapeutic statements made must be based on published, controlled clinical studies and cannot be based on adverse drug reaction reporting systems.

80 While the recommended starting dose for Baycol was always 0.2 mg, the available dosages of Baycol changed three times during the three and a half years that Baycol was available in the Canadian market.

B. SUBMISSIONS OF THE PARTIES ON CERTIFICATION

81 The Plaintiffs submit the decision of the British Columbia court certifying a Baycol class action is consistent with a long line of Canadian cases certifying product liability class actions.^[FN2] They assert there is substantial judicial consensus among Canadian courts in favour of certifying such class actions, with courts describing such actions as the "quintessential class proceeding"^[FN3].

82 The Plaintiffs further submit that this action is ideally suited for class certification. They say there are common issues of fact and law related to the alleged defective design of Baycol, which are best resolved in a class action as Canadian courts have repeatedly recognized in product liability suits and as the B.C. court did with the Baycol suit filed in that province.

83 The Defendants submit this action does not qualify for certification under the *Act* for the following reasons:

- The Plaintiffs have not proposed a proper class definition that states objective criteria by which members of the class can be identified at the outset of the litigation.
- The proposed representative Plaintiffs have both failed to produce any evidence that they have a colourable claim against Bayer. Accordingly, the proposed representative Plaintiffs cannot be members of a class in an action against Bayer in respect of Baycol and cannot fairly and adequately represent the interests of members of any properly defined class.
- Claims upon which common issues may arise must, for purposes of class certification, be limited to those that on the evidence present colourable claims. The bald pleading that Baycol was defective or unfit or not medically efficacious is contradicted by unchallenged evidence and, accordingly, is not a colourable claim from which contentious common issues may arise.
- The Plaintiffs have not offered any evidence that Baycol caused any personal injuries other than rhabdomyolysis with greater frequency or severity than other statins and have not offered any evidence that there is any legitimate claim in respect of such personal injuries.

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

- The only claims which, on the evidence presented, may possibly raise contentious issues relate to the quality and timeliness of warnings of risks of rhabdomyolysis associated with Baycol. In respect of such claims, numerous individual issues of fact in relation to both liability and damages are inextricably interwoven with any issues common to class members and, therefore, there are no issues that are a substantial ingredient of the claim of each class member, the resolution of which would materially advance the interests of each member of the putative class. Specifically, widely divergent injury claims of persons with varying medical histories, who took different doses of Baycol at different times when Bayer had different knowledge about the medicine, in combination with gemfibrozil and in monotherapy, and under various product labels, cannot be adjudicated through a single proceeding.
- Class adjudication of the claims advanced in this action is not, on the facts of this case, the preferable procedure for the resolution of the claims of the putative class members. A class action would inevitably break down into a series of individual adjudications of both liability and damages with the result that the policy objectives underlying the Act would not be achieved.
- The settlement reached in January, 2004 in a multi-provincial class action commenced in Ontario and in an action in Quebec under applicable Provincial class action legislation provides fair and reasonable compensation to persons who suffered from rhabdomyolysis (as defined in the settlement agreement) as a result of taking Baycol and to those with related derivative claims. This settlement, if approved by the courts in Ontario and Quebec, would resolve the claims of those who qualify to receive compensatory payments under the settlement and do not opt out. Under the Act, this is a relevant matter for consideration by the Court. The application for certification, to the extent that it is brought on behalf of those who would qualify for settlement under the Ontario and Quebec settlement should be stayed until after the approval hearings in Ontario and Quebec have been heard and decided.
- There is a conflict between members of the class who allege that they suffered from rhabdomyolysis and members of the class who suffered from other injuries and, as a result, Wheadon cannot fairly and adequately represent the interests of all members of the class for which certification is sought.
- There is no proper Plaintiff resident outside the province agreeing to represent the Atlantic Class or the Atlantic Family Class.

C. THE ISSUES

84 Two main issues arise on this application:

- (a) Whether the requirements for certification have been met.
- (b) Whether certification of the class proposed by the Plaintiffs should be stayed until after the motion for court approval of the Ontario agreement has been decided.

85 Five sub-issues arise under the first issue:

- (i) Whether the Plaintiffs must pass an evidentiary threshold;
- (ii) Whether there is a properly identifiable class;
- (iii) Whether the Plaintiffs' claims raise a common issue;

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

(iv) Whether the class action is the preferable procedure; and

(v) Whether there are proper representative Plaintiffs.

D. THE LAW AND ANALYSIS

(a) *The requirements for certification*

Purpose of Class Actions

86 Class action legislation aims to promote three goals: (i) judicial economy; (ii) access to justice; and (iii) behaviour modification; explained by the Supreme Court of Canada^[FN4] as follows:

The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.

Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): see W. K. Branch, *Class Actions in Canada* (1998), at para. 3.30; M. A. Eizenga, M. J. Peerless and C. M. Wright, *Class Actions Law and Practice* (1999), at para. 1.6; Bankier, *supra*, at pp. 230-31; Ontario Law Reform Commission, *Report on Class Actions* (1982), at pp. 118-19.

Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, *supra*, at para. 3.40; Eizenga, Peerless and Wright, *supra*, at para. 1.7; Bankier, *supra*, at pp. 231-32; Ontario Law Reform Commission, *supra*, at pp. 119-22.

Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: see "Developments in the Law -- The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives" (2000), [113 Harv. L. Rev. 1806, at pp. 1809-10](#); see Branch, *supra*, at para. 3.50; Eizenga, Peerless and Wright, *supra*, at para. 1.8; Bankier, *supra*, at p. 232; Ontario Law Reform Commission, *supra*, at pp. 11 and 140-46.

87 Our Rule 7A.01 (4) expressly recognizes judicial economy, access to justice, and fairness to those responding to a

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

class action proceeding as guides for the interpretation and application of our rules.

88 The Plaintiffs submit that a fourth purpose of the Newfoundland and Labrador *Class Actions Act* is to protect the rights of the residents of this province to ensure their rights are not subverted by class actions in other jurisdictions. I agree that our Rule 7A.04(6), discussed below at paragraph 171, identifies certification in another province as only one factor to be considered in determining whether to certify as a class proceeding here. The Rule also recognizes this Court's responsibility to ensure that residents of this Province are adequately represented in class action proceedings. These matters may be considered within the category of access to justice.

Test for Class Certification

89 The test for class certification is set out in section 5(1) of the *Class Actions Act* as follows:

5 (1) On an application made under section 3 or 4, the court shall certify an action as a class action where

- (a) **the pleadings disclose a cause of action;**
- (b) **there is an identifiable class of 2 or more persons;**
- (c) **the claims of the class members raise a common issue, whether or not the common issue is the dominant issue;**
- (d) **a class action is the preferable procedure to resolve the common issues of the class; and**
- (e) **there is a person who**
 - (i) is able to fairly and adequately represent the interests of the class,
 - (ii) **has produced a plan for the class proceeding that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and**
 - (iii) **does not have, on the common issues, an interest that is in conflict with the interests of other class members.**

The Evidentiary Threshold

90 I agree with the Plaintiffs that this test establishes a "low threshold" for class certification. This was confirmed in *Hollick* where the Chief Justice noted the evidentiary threshold is not an onerous one.^[FN5] Canadian courts have tended to give class proceedings legislation a large and liberal interpretation to insure that its policy goals are realized.^[FN6] Courts must be mindful not to impose undue technical requirements on plaintiffs.

91 Class certification is not a trial. It is not a summary judgment motion. Class certification is a procedural motion which concerns the *form* of an action, not its *merits*. Contentious factual and legal issues between the parties cannot be resolved on a class certification motion. The Supreme Court of Canada has stated:

Thus the certification stage is decidedly not meant to be a test of the merits of the action: see *Class Proceedings Act*, 1992, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding") . . . Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

generally *Report of the Attorney General's Advisory Committee on Class Action Reform*, at pp. 30-33.[\[FN7\]](#)

92 Similarly, Mercer J. previously ruled in the present case:

. . . the certification stage is not meant to determine the merits of the action. Indeed the court must be vigilant to ensure that the certification application does not become mired down in the merits of an individual claim.[\[FN8\]](#)

93 That certification is not an inquiry into the merits is confirmed by section 6(2) of the *Act* which provides:

An order certifying an action as a class action is not a determination of the merits of the action.

94 Bayer submits the *Hollick* decision establishes that plaintiffs seeking certification as a class proceeding must pass an evidentiary threshold, which the present Plaintiffs have not done. Bayer refers to the following comments of the Chief Justice:

The question arises, then, to what extent the class representative should be allowed or required to introduce evidence in support of a certification motion. . . . In my view the [Ontario] Advisory Committee's report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own.

...

I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub*[\[FN9\]](#) held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the [Ontario Report] clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ('evidence on the motion for certification should be confined to the [certification] criteria'). The *Act*, too, obviously contemplates the same thing: see s.5(4)[\[FN10\]](#) ('[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence'). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the *Act*, other than the requirement that the pleadings disclose a cause of action.[\[FN11\]](#)

95 The Supreme Court in *Hollick* found "some basis in fact", that it established as the evidentiary burden, for the commonality requirements, based on the complaint records filed, which showed many individuals other than the representative plaintiff were concerned about the noise and physical emissions from the landfill forming the basis of the claims. But the Court concluded a class proceeding would not be the preferable procedure for the resolution of the common issues, finding that any common issue was negligible in relation to the individual issues,[\[FN12\]](#) the plaintiffs had another avenue of redress through a Small Claims Trust Fund and behaviour modification would be achieved by the Defendant being forced to internalize the costs of its conduct either through the prosecution of substantial claims or through payments from that Trust Fund.

96 In the present case Patrick Wheadon and Bruce McCullough gave evidence that they experienced muscle pain and weakness from taking Baycol. Douglas Lennox's affidavit establishes that as of August 24, 2001 there had been 121 reports of rhabdomyolysis, myopathy and increased CPK reactions associated with Baycol (Appendix H, Table 1) and 25 individuals from Newfoundland and Labrador and the other Atlantic Provinces have contacted Plaintiffs' counsel with respect to this action. Plaintiff's counsel confirm this number has increased by approximately 30 since the present hearing was publicized. I am satisfied that this evidence is sufficient to meet the requirement for a supporting affidavit as set out in our Rule 7A.04(2) and, like the complaints in *Hollick*, provides some basis in fact for the present claims and satisfies the evidentiary burden on the Plaintiffs to show the required commonality. I deal with this further below, as I turn to the specific certification requirements of s. 5(1).

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

Cause of Action

97 Section 5(1)(a) of the *Act* requires that the Plaintiffs have a cause of action. This requirement is determined solely on the pleadings. The allegations in the Statement of Claim are accepted as true. The Plaintiffs will satisfy this test unless it is shown that it is "plain and obvious" from the pleadings that the action must fail.[\[FN13\]](#)

98 The Plaintiffs have pleaded an action framed in negligence. They allege that the Defendant knew or ought to have known that Baycol was unsafe, and that the Defendant ought not to have marketed the drug, or ought to have recalled the drug sooner, or ought to have provided far more effective warnings.

99 Bayer accepts that the Plaintiffs have sufficiently pleaded a cause of action.

Identifiable Class

100 Section 5(1)(b) of the *Act* requires that there be an identifiable class. The Plaintiffs propose the following class (and sub-class) definitions:

(i) Persons resident in Newfoundland and Labrador who were prescribed and ingested Baycol and who claim personal injury as a result ("Provincial Class");

(ii) Persons who have a derivative claim on account of a family relationship with a person in (i) ("Provincial Family Class");

(iii) Persons resident in Nova Scotia, New Brunswick, and Prince Edward Island who were prescribed and ingested Baycol, who claim personal injury as a result, and who opt-in to this proceeding ("Atlantic Class");

(iv) Persons who have a derivative claim on account of a family relationship with a person in (iii), who opt-in to this proceeding ("Atlantic Family Class").

• Objectively defined

101 The importance of a clearly and objectively defined class was highlighted by Chief Justice McLaughlin in *Western Canadian Shopping Centre Inc. v. Dutton*[\[FN14\]](#):

First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known.

102 Bayer says the class proposed by the Plaintiffs in this case suffers from the fundamental defect that members of the proposed class cannot be identified at the outset of the litigation by the application of objective criteria, since the proposed definition leaves it to each possible class member to decide, subjectively, and at the time of the person's choosing, whether he or she wishes to assert injury that he or she attributes to use of Baycol.

103 This alleged defect in class definition also arose in *Caputo*[\[FN15\]](#). There, the plaintiffs sought certification of a class comprised of those who claimed personal injury as a result of consumption of tobacco products and, during

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

argument, counsel changed the proposed definition to remove the requirement for a claim of injury. Winkler J. held all of the definitions proposed by the plaintiffs were unacceptable:

In my view, the present action is an amalgam of potential class proceedings that make it impossible to describe a single class sharing substantial 'common issues', the resolution of which will significantly advance the claim of each class member, which is the test to be applied according to *Hollick*. Moreover, this is not a case where the creation of subclasses will address the primary class definition deficiency. Subclasses are properly certified where there are both common issues for the class members as a whole and other issues that are common to some but not all of the class members. This is not the case here. Rather, the plaintiffs have melded a number of potential classes into a single proceeding. The result is an ambitious action that vastly overreaches and which, consequently, is void of the essential element of commonality necessary to obtain certification as a class proceeding. Simply put, the reason that no acceptable class definition has been posited is that no such definition exists.

104 Bayer submits the class definition proposed by the Plaintiffs suffers from the same defects as the definitions suggested in *Caputo*; that here, as in *Caputo*, there is an insufficient evidentiary record upon which any proper class definition could be based, there are no objective criteria by which class members can be identified and the requirement that a properly identifiable class be shown has not been satisfied. I do not agree. The first identifying factor, prescription and ingestion of Baycol, would probably be sufficient were it not for the need to avoid overinclusivity, discussed below. This factor can be objectively determined, sets a clear boundary for the class so that it is not unlimited, and can be determined without reference to the merits of the action.^[FN16] The second identifying factor, claim of personal injury, Bayer objects to as subjective. But although there will obviously be a subjective reason for making a claim, whether or not one makes a claim can be objectively determined. It is not necessary that every class member be named or known at the outset but only that a "claim to membership in the class be determinable by stated, objective criteria".^[FN17] The Plaintiffs meet this requirement here.

105 I find support for this conclusion in *Rumley v. British Columbia*^[FN18], where the class in a sexual abuse case was defined by reference to students attending a school between certain years who resided in British Columbia and claimed to have suffered injury as a result of sexual misconduct at the school. The class definition was not in issue at the Supreme Court level but had been accepted by the British Columbia Court of Appeal.

- **Not overinclusive**

106 Bayer also submits that the putative representative must show that the class is defined sufficiently narrowly, that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Bayer argues the mere fact that a group of people may be identifiable is not sufficient to render them a class for the purposes of class action legislation. Bayer submits that where members of a class as defined have no colourable claims, let alone claims which raise a common issue, they must be excluded from the class.^[FN19] Bayer says that where the class could be defined more narrowly, the Court should either disallow certification or allow certification on condition that the definition of the class be amended.

107 Bayer submits the evidence in the present case is unchallenged that the vast majority of persons who ingested Baycol suffered no side effects or injury arising from Baycol, but benefited from the medicine. Bayer argues that those who ingested Baycol and experienced only fully disclosed side effects associated with Baycol and all other statins share no interest in the resolution of any common issue because, like those who benefited from the drug, they suffered no loss and have no basis for a claim. Therefore, says Bayer, these individuals cannot be members of any properly defined class.

108 The problem with Bayer's argument is that it seeks to establish overinclusivity of class definition by bringing the merits of the litigation into the determination of class membership. I am not entitled at this stage to conclude that all side effects were fully disclosed, or that the side effects of Baycol were the same as all other statins, or that, even if

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

they were, this meets an acceptable standard of care and there is no basis for a claim. Neither should I conclude that the vast majority of people who ingested Baycol suffered no side effects. This may be the thrust of the evidence now before this Court. But the Plaintiffs have had limited opportunity to retain experts and may only be able to afford expenditures in this regard if their claims are aggregated. It would frustrate the objects of the *Act* to require Plaintiffs to provide such expert evidence at this stage. For reasons discussed under "The Evidentiary Threshold" above, I am not prepared to conclude the Plaintiffs have no colourable claims. In my view the proposed reference to persons who claim personal injury is an appropriate method of narrowing the class so as to avoid the overinclusivity of defining merely by prescription and ingestion of Baycol, when some who ingested may not pursue claims because they believe they were not unduly harmed (whether or not this is in fact correct being a matter going to the merits).

109 The suggested class and subclasses are sufficiently numerous. The Plaintiffs have provided affidavits from two persons, Patrick Wheadon and Bruce McCullough, who are seeking to act as representative Plaintiffs for the Provincial and Atlantic classes respectively. They both fit squarely within the class definition. They both took Baycol and they both allege injury. The Statement of Claim and the affidavit of Douglas Lennox establishes that there are others in this province and within the other Atlantic Provinces who also fall within the definition. Gray J. in *Bouchanskaia* concluded the existence of two named plaintiffs was sufficient. [\[FN20\]](#)

110 The Supreme Court of Canada has held that an appropriate class definition in a product liability case will tend to be obvious and straightforward. The class will typically be defined as consumers who purchased the product. [\[FN21\]](#) That is basically what is proposed here. Narrowing the proposed class by excluding those who do not allege injury seems simply a matter of common sense.

Common Issues

111 The *Act* requires that the claims of class members raise a common issue. The Plaintiffs have proposed the following common issues:

- (i) Whether Baycol causes serious side effects, and, if so, the nature and extent of those side effects?
- (ii) Was Baycol defective and/or unfit for its intended use?
- (iii) Was the Defendant negligent and, if so, when and how?
- (iv) Did the Defendant owe a duty of care to the Class members?
- (v) Did the Defendant breach the standard of care expected of it and, if so, when and how?
- (vi) Should the Defendant pay punitive damages, and if so, to whom and in what amount?

Common Issues - Evidentiary burden

112 To satisfy s. 5(1)(c) of the *Act*, the action must raise common issues of fact or law. Such common issues need not be determinative of liability, nor do they need to be "dominant issues" in the litigation, as required in the United States [\[FN22\]](#). They are simply issues which if decided at a common issues trial will advance the litigation in some meaningful way. Appellate courts have described common issues as follows:

When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. [\[FN23\]](#)

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

113 Bayer accepts that an application for class certification is not a trial, and that the merits of contentious factual and legal issues cannot be resolved on a class certification application. Bayer submits, however, that on a certification application the Court must examine the evidentiary record to determine whether there are, indeed, colourable claims involving contentious facts that raise legitimate common issues for trial. Bayer argues the representative plaintiff must provide the Court with a factual record sufficient to ground the relief sought and not merely rely upon unsupported allegations in a pleading.

114 As previously discussed under "The Evidentiary Threshold", the burden for a plaintiff on an application for certification of an action as a class proceeding was established in [Hollick\[FN24\]](#) as a requirement to show merely "*some basis in fact*" for each of the certification requirements, other than that the pleadings disclose a cause of action. The adequacy of the evidentiary record supporting the application for certification will vary in the circumstances of each case.

115 The evidence before this Court is that all statins, including Baycol, carried the risk of adverse side effects, including rhabdomyolysis. Baycol was withdrawn because of continuing reports of rhabdomyolysis when Baycol was co-prescribed with gemfibrozil, and when therapy was prescribed at the highest available dose. Bayer notes the Lennox affidavit filed on behalf of the Plaintiffs, which cites a comparison taken from the *Canadian Adverse Drug Reaction Newsletter* of reports of adverse events, including rhabdomyolysis, among six statins in Canada. Bayer claims it is well established that reports of suspected adverse reactions must not be used to estimate the incidence of adverse reactions. Even so, says Bayer, this publication discloses that there were fewer reports of myopathy with Baycol than with several of the other statins included in the comparison, and only one-fourth the number of reports of myopathy with Baycol than reported with Atorvastatin ("Lipidor"), introduced to the market only one year earlier. Bayer argues that, therefore, even the evidence presented by the Plaintiffs does not give rise to a colourable claim for the proposed representative Plaintiffs or others who assert similar claims, for the purpose of determining whether any common issues arise.

116 I do not accept this argument. As noted above under "The Evidentiary Threshold", I find that Wheadon and McCullough have established some basis in fact for common issues by deposing that they ingested Baycol and suffered injury, when this is considered in the context of the information supplied by the Lennox affidavit. I will now consider each of the proposed common issues in turn.

Common issue (i) - Baycol side effects

117 I agree with the Plaintiffs that their proposed common issue (i) set out in paragraph 112 above is a common issue of fact. The parties do not agree on the severity, frequency or extent of the Baycol side effects. A factual inquiry as to the nature of the problems caused by an allegedly defective drug is an appropriate common issue, as was found in *Wilson v. Servier*[FN25]. If Baycol did not cause any problems, or if the problems were not serious, then this finding may dispose of the entire action. But if Baycol did cause serious problems then the trial court can go on to consider whether it was unfit for its use and whether Bayer breached the standard of care owed the Plaintiffs.

118 I do not accept Bayer's submission that, because other statins carry the risk of side effects and because Bayer has submitted unchallenged medical evidence describing the side effects associated with Baycol and other statins, therefore the nature and extent of side effects of Baycol is not a matter of controversy and is not a common issue and *Servier* should be distinguishable. The Plaintiffs allege that Baycol is not like other statins and, as noted by Gray, J. in [Bouchanskaia](#), the Plaintiffs at this stage have not had the opportunity to explore the evidence regarding the nature and extent of side effects. Gray J. stated:

Bayer essentially asked the court to determine the extent of the plaintiff's claim on liability on the basis of the evidence filed at the certification hearing. Plaintiff's counsel argued that the evidence provided at the

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

certification hearing need only satisfy the court that the requirements of section 4(1) are satisfied.

It is not appropriate for me to make any determination of contentious issues on the basis of the evidence available at the certification hearing. The claim is at a preliminary stage, and the plaintiff has not had the opportunity to explore the evidence regarding the underlying claims. While there may be cases in which the court could conclude at this stage that there could not be any merit to a plaintiff's claim, I am not able to come to that conclusion on the evidence before me.[\[FN26\]](#)

119 *In the present case, proposed common issue (i) is a common issue of fact. What problems did Baycol actually cause? How serious were its effects? This is a contentious matter between the parties. While the Defendant at least implicitly acknowledges problems with its drug (it did pull Baycol from the market), the submissions filed by the parties reveal a real divergence of opinion as to the severity, frequency and extent of these problems. Resolving this issue will move the litigation forward.*

120 *Furthermore, general findings of fact on common issue (i) will be of assistance to the court and the parties in any subsequent hearings on individual damages. In *Bywater v. TTC*[\[FN27\]](#), the court certified a common issue as to the nature and extent of a subway fire. A common issue trial was subsequently held and a trial verdict rendered to assist with individualized assessments of damage that followed.*

Common issue (ii) - Defective and/or unfit for intended use

121 The second common issue proposed by the plaintiffs is whether Baycol was defective and/or unfit for its intended use. The Plaintiffs submit that an inquiry into whether Baycol was defective or unfit is "ideally suited for class certification". Bayer submits that in this case, however, there is no need for such inquiry because the undisputed evidentiary record shows that Baycol was medically efficacious and that the vast majority of patients who took it did not suffer any side effects or any injury arising from Baycol, but rather benefited from Baycol. A small percentage of patients are reported to have suffered from rhabdomyolysis. Bayer says that, when the claims of the Plaintiffs are examined closely and critically, it is clear that the claims advanced are, at their heart, claims of failure to adequately warn. Bayer argues the analysis of this issue depends upon individual circumstances, such as the time of the warning and the information received, so there is, therefore, in reality no common issue concerning whether Baycol was defective or unfit. I do not agree.

122 I agree with the Plaintiffs that an inquiry into whether a drug was defective or unfit is ideally suited for class certification. This was confirmed by the British Columbia Court of Appeal in *Harrington v. Dow Corning Corp.*[\[FN28\]](#) as follows:

At the risk of oversimplifying a complex decision-path, I venture to suggest the first step in every product's liability case alleging negligent design, manufacture or marketing is the determination of whether the product is defective under ordinary use or, although non-defective, has a propensity to injury. Some American authorities refer to this step as 'general causation', whether a product is capable of causing the harm alleged in its ordinary use.

The second step is the assessment of the state of the manufacturer's knowledge of the dangerousness of its product to determine whether the manufacturer's duty was not to manufacture and distribute, or to distribute only with an appropriate warning. It may be prudent to refer to this as an assessment of the state of the art; it may be that a manufacturer did not but should have known of its product's propensity for harm.

123 Common issue (ii) will require a factual and legal inquiry into whether Baycol was defective and/or unfit for its intended purpose. This will be a risk-based assessment of the drug comparing it to allegedly safer alternative drugs. The inquiry need not involve any class members and will advance their claims. Common issue (ii) is a necessary

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

precursor to the issues that follow. If Baycol was fit for its intended purpose then this finding may dispose of the entire action. If Baycol was unfit then the trial court can go on to consider whether the Defendant was negligent or breached a standard of care.

124 I do not agree with Bayer's argument that the claims advanced are in reality solely claims of failure to adequately warn. As noted in *Harrington*, that will be merely the second step in the inquiry. The first step will be consideration of the common issue concerning whether Baycol was defective or unfit. Bayer argues that an inquiry into "general causation" is unnecessary here because it was known that, although it was safe and effective for the vast majority of users, Baycol was capable of causing rhabdomyolysis as well as other side effects. I do not accept this argument. The Plaintiffs claim the side effects were more extensive, more frequent, and more severe than Bayer disclosed and they are entitled to go to trial on this common issue. For example, the Plaintiffs dispute Bayer's assertion that side effects, such as muscle pain and muscle weakness, short of rhabdomyolysis, could not continue after Baycol use had been discontinued. This issue may be resolved independently of any individual issue and would advance the interests of each class member.

Common issue (iii) - Breach of duty

125 Gray J. in *Bouchanskaia* did not certify the question of whether the defendant owed a duty to the class in the B.C. Baycol class action as had been proposed by the plaintiffs in that case, but rather exercised her discretion to combine this issue with the issue of whether a duty was breached. The Plaintiffs here are amenable to this approach and are agreeable to have common issues (iii), (iv) and (v) similarly combined. Consistent with the ruling of Gray J. then, these three proposed common issues could be boiled down to the following question:

Did the Defendant breach a duty of care owed to class members and if so, when and how?

126 Bayer admits that, as a distributor of a pharmaceutical drug, it owed a duty of care to patients prescribed that drug to provide adequate warnings concerning its potential side effects. What must be assessed, however, says Bayer, is if it can be determined whether Bayer, as a distributor, breached its duty of care to Baycol users on a basis that is common to all class members and whether the resolution of this question would materially advance the interests of each and every member of the putative class. Bayer submits it does not serve the ends of either fairness or efficiency to certify an action based upon issues that are common only when stated in the most general terms, since, inevitably, such an action would ultimately break down into individual proceedings.

127 Whether Bayer provided adequate warnings in respect of Baycol's potential side effects will depend upon many considerations, including the risk in issue, the harm suffered, the representations made and when they were made (or not made), Bayer's state of knowledge at all material times, and to whom representations were made. Bayer argues these considerations will vary for each individual claimant and, therefore, the requisite standard of care applicable to each proposed class member cannot be determined on a class-wide basis with generalized proof of one set of facts.

128 Bayer says it modified over time its communications concerning potential side effects of Baycol in keeping with its knowledge of those side effects. There was no single representation that was made to all persons who ingested Baycol, and there was no single point in time when all representations to Baycol patients were made. Bayer co-promoted Baycol with Fournier so there was not a single person, or company, who communicated such representations. Bayer submits the common issues that are asserted in this case are, therefore, not focussed on a particular point in time, nor do they relate to a single pivotal issue. For this reason, says Bayer, whether it breached a duty of care to a given claimant can only be determined on a case-by-case basis.

129 Bayer argues that to determine the standard of care issue for each member of the class would require an individual analysis of when each patient or each patient's prescribing physician received representations from Bayer and what information each prescribing physician conveyed to his or her patient. In a duty to warn case involving a medical

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

product with inherent risks (such as any prescription medicine, including Baycol), an individualized analysis of the substantive elements of the cause of action for each member of the class is inevitable. In this case, the significance of the many individual issues of fact is magnified by the inclusion in the class of persons with varying medical histories who may assert widely diverse personal injuries and who took different doses of Baycol at different times when Bayer had different knowledge about the medicine.

130 In [Rumley](#)[FN29] the Supreme Court of Canada accepted that the issue of breach of duty could be amenable to resolution in a class proceeding even though the relevant standard of care would have varied over time and between individuals. This meets Bayer's objection that the standard of care in the present case would have been in flux.

131 As in [Bouchanskaia](#), Bayer argued that the Plaintiffs' claims of breach of duty to warn are analogous to claims for multiple negligent misrepresentations[FN30], where courts have refused certification. I agree with Gray J. who in [Bouchanskaia](#)[FN31] found the claims would focus on Bayer's product monograph, on Bayer's conduct and knowledge, rather than on individual circumstances, and accordingly the claims were more similar to negligent misrepresentation claims that were certified. She properly noted that whether Bayer should have distributed Baycol or provided stronger warnings are questions addressing Bayer's conduct toward the class as a group. A similar question is whether Bayer should have notified prescribing doctors about the importance of establishing a baseline CK (creatin kinase) level by blood tests. In any event, as previously noted, the claims in the present case are not merely claims of failure to warn.

132 The issue of breach of a duty has been repeatedly certified in product liability class actions. It is an appropriate common issue because it focuses upon the Defendant's knowledge and conduct, can be resolved without the participation of class members, and, depending on its resolution, will either advance or dispose of their claims. Gray J. found the following to be a common issue in the Baycol class action in [Bouchanskaia](#): "Did Bayer breach the duty of care it owed to persons who ingested Baycol in its role with Baycol, including in designing, manufacturing and/or distributing Baycol and, if so, when did the breach begin?" She stated:

Resolution of the issue of whether Bayer breached the standard of care is common to all those who allege that they suffered damages as a result. If the breach was by failing to withdraw the drug from the market or putting it on the market in the first place, resolution of the question of whether Bayer breached the standard of care will advance the claim for those members of the class who ingested the drug following the breach. That would include the entire class, if Baycol ought not to have been distributed at all.

Resolving this issue will advance the interests of the class, leaving individual issues like causation to be litigated later in separate trials, if necessary. The particulars of negligence alleged focus on Bayer's conduct towards consumers as a group. While **the court may be required to give a nuanced answer in respect of the alleged failure to provide adequate warning, the central issues are common.**[FN32]

I agree with Gray J.

133 The Plaintiffs' litigation plan recognizes that there will be individual issues remaining to be resolved after a common issues trial. If the Plaintiffs prove breach of duty as a common issue they will still need to prove causation and damages in the course of individualized hearings. This approach is consistent with Canadian class action jurisprudence. Canadian courts have repeatedly certified breach of duty as a common issue, leaving issues of causation and damages to individualized hearings.

134 In *Wilson v. Servier*, another defective drug class action, the Court recognized the existence of at least 21 different individual issues that would remain after a common issues trial but nonetheless found that common issues arising from the drug manufacturer's alleged conduct required certification. The court wrote:

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

Undoubtedly, a large number of individual issues will arise for each member of the class who claims that a disease has resulted from the consumption of the diet pills. Indeed, there will probably have to be individual discovery of these class members. The CPA contemplates a bifurcated process as necessary and appropriate to accomplish this.

However, the existence of individual issues does not detract from the reality that there are significant common issues, the resolution of which will advance the progress of the litigation.[\[FN33\]](#)

In my view, these words are applicable in the present case. They meet the concerns of Bayer, based on [Caputo](#)[\[FN34\]](#), that too many individual decisions will remain after resolution of any common issues. I agree with Gray J. in [Bouchanskaia](#) that the claims in the present case will probably be moderate in number and will not be unmanageable as was the case in [Caputo](#). I conclude resolution of the following common issue will significantly advance the progress of the present litigation: Did the Defendant breach a duty of care owed to class members and if so, when and how?

Common issue (iv) - Punitive damages

135 The final common issue proposed by the Plaintiffs is whether punitive damages should be awarded. Bayer submits that, while it has been held in some cases that a claim for punitive damages may give rise to a common issue, there must first be a finding that there is at least one common issue relating to claims for compensatory damages that would materially advance the interests of all class members. Accordingly, says Bayer, where, as here, there are no colourable claims for compensatory damages that give rise to common issues the resolution of which will advance the interests of all class members, a claim for punitive damages will not alone justify class certification. There must be some underlying cause of action to be determined on a class-wide basis to which the claim for punitive damages can attach before certification can be granted.

136 As I have decided above that there are colourable claims for compensatory damages that give rise to certifiable common issues, these objections of Bayer no longer apply. The issue of punitive damages has been repeatedly certified by Canadian courts[\[FN35\]](#). Whether the plaintiffs are entitled to punitive damages and the quantum thereof is entirely dependant on the conduct of the defendant. It is a common issue which can be decided without the involvement of class members.

Preferable Procedure

137 To satisfy s. 5(1)(d) of the *Act* I must determine whether class certification is the preferable procedure. To complete this analysis I must consider the extent to which the proposed proceeding will achieve the goals of the *Act*, namely, judicial economy, access to justice, and behaviour modification. The Supreme Court of Canada held in [Hollick](#) that the question of preferability must take into account the importance of the common issues in relation to the claims as a whole, in order to determine whether resolution of common issues will significantly advance the interests of all class members.[\[FN36\]](#)

(i) Judicial economy

138 Bayer argues a class action will not avoid duplication of fact finding and legal analysis as here individual issues regarding each proposed class member will be determinative of liability in each case. For each member of the proposed class, an examination for discovery will have to be conducted with respect to issues of standard of care, reliance, causation and damages as well as dealing with questions as to the state of knowledge, assumption of risk and contributory negligence. The role of learned intermediaries at the time of prescription, after prescription and at the time adverse side effects occurred would also have to be examined on an individual basis at discovery. Bayer says none of these issues relating to the claim of each member of the proposed class can be decided in a trial of common issues.

139 Bayer also argues that any common issue would be overwhelmed by the preponderance of individual issues that

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

must be resolved in order for the Court to determine liability and damages for a given claim, referring to comments of the Court in [Rumley](#):

The elements of a claim for negligent misrepresentation require that the plaintiff must have relied on the representation and suffered damage as a result of the reliance: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), at 110. . . . Issues of reliance and causation linking representations to the harm alleged will undoubtedly vary from claimant to claimant. Claims based on failure to warn face similar individualized questions of linking causation of the harm to the absence of a warning. In my view, these considerations support the conclusion that these claims lack sufficient commonality to be amenable to class proceedings.[\[FN37\]](#)

140 Bayer notes the relevant period for inquiry into the state of knowledge of Bayer encompasses a time preceding the introduction of Baycol to the marketplace, and continues through the period of introduction and marketing of the different dosages of Baycol in Canada until it was voluntarily withdrawn. Each claim would have to be examined in relation to the state of knowledge of Bayer at the material times. Further, says Bayer, the individual issues are not limited to causation and damages, but include issues concerning communications to and by learned intermediaries and issues of reliance by individual claimants. Resolution of the causation issue for a given claimant will, as shown above, depend upon a number of individual factors. Bayer argues the individual issues are such that a class proceeding would degenerate into multiple actions that would have to be tried separately and would offer no advantage over individual trials.

141 Bayer says examples of the types of individual inquiries that would be required to resolve the claim of a given claimant are as follows:

Individual Medical Issues:

What is the age and gender of the patient?

What is the patient's education and training? Is the patient a trained medical professional, pharmacist, other health care professional or medical researcher or someone possessed of relevant scientific knowledge?

What was the patient's underlying risk-benefit profile?

What other underlying medical conditions did the patient have?

Did the patient have any predisposition to side effects?

Has the patient previously experienced the side effects now claimed to be caused by Baycol?

Was the patient previously prescribed any other statin? Did the patient suffer any adverse reaction to that statin? Why was use of that statin discontinued?

Did the patient have any medical history of liver disease or dysfunction, kidney disease or dysfunction?

Did the patient have any history of alcohol, cocaine, opiate or other illicit drug use?

What other prescription drugs did the patient take? What were the side effects associated with each of those drugs? Was there any relevant drug-drug interaction between Baycol and any other drug the patient took? Did the patient previously suffer any adverse reaction to another prescription drug?

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

Did the patient take gemfibrozil?

Information Provided to the Patient:

What written information did the patient receive regarding Baycol? Did Bayer prepare that written material or was it prepared by a third party?

Did the patient receive Baycol as part of a clinical trial? Was the patient's informed consent to participate in the clinical trial obtained?

What did the patient's prescribing doctor advise the patient about the risks and side effects of Baycol? Was more than one prescribing doctor involved?

Did any other health care provider provide any information to the patient regarding the risks and side effects of Baycol?

Did the patient's pharmacists provide the patient with any information regarding Baycol? Was more than one pharmacist involved?

Did the patient obtain any other information regarding Baycol from any source other than the prescribing physician, another health care provider or the pharmacist?

Was further information provided to the patient about Baycol after the time of first prescription?

Did the patient rely on Bayer's information about Baycol in deciding to take Baycol?

Knowledge of Prescribing Physician, Pharmacist and other Health Care Professionals:

What was the prescribing physician, pharmacist or other health care professional told about Baycol by Bayer? What written information was provided? Did Bayer prepare the written material or was it prepared by a third party? Was the product monograph read by the physician, pharmacist or other health care professional?

What information did the physician, pharmacist or other health care professional have about Baycol from sources other than Bayer including his or her own experience, other health care professionals, scientific conferences and lectures and medical literature?

Did the prescribing physician, pharmacist or other health care professional receive any information about Baycol from a sales representative employed by Bayer?

Did the prescribing physician, pharmacist or other health care professional receive any information about Baycol from a sales representative employed by Fournier Pharma Inc.?

Did the prescribing physician, pharmacist or other health care professional recommend Baycol to the patient knowing of its potential side effects? If not, would the prescribing physician, pharmacist or other health care professional have recommended Baycol if he or she had known of its potential side effects? Why or why not?

Different Warnings at Different Times:

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

What warnings, information, contraindications, labelling and written materials were provided by Bayer about Baycol at the time Baycol was prescribed?

Use of Baycol by the Patient:

Was the patient compliant with the instructions provided by the prescribing physicians regarding the use of Baycol and reporting of side effects?

What dose of Baycol was prescribed? Did the dose change over time? Was the dose prescribed appropriate and in accordance with the information provided by Bayer?

When was Baycol prescribed? Was it re-prescribed and if so, when and by whom?

When did the patient start taking Baycol? When did the patient stop taking Baycol?

Management of Side Effects:

Did the patient report the adverse side effect in a timely manner?

Was the complaint acted upon by the patient's physician in a timely manner? Was appropriate treatment provided to avoid injury? Did the patient refuse any treatment?

Causation and Damages:

Did the patient suffer any injury that was caused by Baycol?

What is the nature of the injury allegedly suffered by the patient? Is it a muscle-related injury such as rhabdomyolysis? Some other type of injury?

Did the patient have any prior history of experiencing physical effects similar to the side effects now claimed to be caused by the use of Baycol?

Was the injury suffered one in respect of which a warning had been provided by Bayer? What was the nature of the warning provided?

Has the patient recovered from the injury? What is the extent of injury suffered?

Special Damages:

Has the patient suffered any economic damages?

What are the patient's personal circumstances, including the nature of the patient's employment, patient's income, out of pocket expenses incurred, etc.?

142 These examples merely reinforce the point that resolution of the common issues will not be finally determinative of liability. But, as found in *Bouchanskaia* and *Wilson v. Servier*^[FN38], resolution of whether Bayer breached the standard of care, for example if Baycol ought not to have been distributed at all, will advance the interests of the class and the focus here will be on the group. Judicial economy will be served by avoiding unnecessary duplication in

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

fact-finding and legal analysis regarding the common issues. The common issues are not negligible in relation to individual ones. As noted by Macpherson J.A. in *Carom v Bre-X* [FN39] the common issues need not be determinative of liability. It is sufficient if they advance the action.

(ii) Access to justice

143 Access to justice is an important consideration in assessing preferability. A class proceeding promotes access to justice when people have the same or similar claims against a large corporate defendant which, on their own, are too small to justify individual litigation. Often in such circumstances, only a class proceeding will put the parties on a sufficiently even footing. [FN40]

144 Canadian courts and legislators have endorsed the effectiveness of class action legislation in dealing with product liability suits because such cases typically involve a central allegation as to whether a product was defective or caused harm. The cost of marshalling the expert evidence needed to prove this allegation at trial can be prohibitive for individual plaintiffs. In such a case only by combining claims within a class proceeding will claimants have a fighting chance against a large corporate defendant. The foundational 1982 *Report of the Ontario Law Reform Commission on Class Actions* stated, at p.264:

In particular, product liability claims may often be 'individually non-recoverable'. The complexity of proving a products liability cases, involving allegations relating to planning, design and manufacture of sophisticated products, may create a situation in which the potential recovery does not justify the cost of a lawsuit. Unlike the position adopted by certain American courts in this area, the Commission is of the view that threshold questions relating to the existence and nature of a product defect, or a representation made in connection with a product, present common issues that may well be amenable to class treatment, and that individual issues may, in appropriate cases, be determined in subsequent proceedings.

145 The *Bouchanskaia* decision to certify a Baycol class action for British Columbia residents is consistent with this view.

146 Certifying the present action will promote access to justice. Aggregating the claims of all proposed class members will help to make it economic for all of these Plaintiffs to pursue a remedy against Bayer. Denying certification would mean that many or all of them would be without any remedy.

(iii) Behaviour modification

147 Bayer says it withdrew Baycol voluntarily and the drug has not been sold in Canada since August 8, 2001. Bayer was not required by Health Canada to recall Baycol. Bayer argues it responded quickly and reasonably in withdrawing Baycol from the market. Bayer instituted a pharmacy-based returns program, assisted some patients in dealing with their pharmacy to obtain a refund and believes that all patients who returned unused product have been compensated for it. Moreover, Bayer has adopted a worldwide policy for the resolution of claims relating to Baycol and has stated publicly that it is prepared to compensate anyone who experienced serious side effects, and in particular rhabdomyolysis, as a result of taking Baycol, regardless of legal defences to such claims. Although in these circumstances behaviour modification may not be as significant as in other cases, still, as noted in *Western Canadian Shopping Centres*: [FN41]

Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery.

I am satisfied a class action in the present case will help ensure Bayer will be forced to internalize the costs of any

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

unlawful behaviour.

148 Certifying this action is in the public interest, and will promote behaviour modification of actual and potential wrongdoers. Attaching liability to the manufacturer of a defective drug helps to create appropriate incentives for the manufacture of safer drugs in the future for the benefit of society as a whole. In this way, private litigation yields public benefits. In certifying a defective drug class action in *Wilson v. Servier*, Cumming J. stated:

Finally, the policy objective of behaviour modification is fostered through a class proceeding. If a drug is defective and liability attaches to a manufacturer or seller, a significant incidental result is that the pharmaceutical industry is more likely to take greater care in the development and testing of new products to ensure their safety before marketing them. The thalidomide catastrophe is illustrative of the public interest in ensuring safe drugs. The CPA's goal has been described as inhibiting 'misconduct by those who might ignore their obligations to the public' . . . The CPA serves to assist in regulating the pharmaceutical industry for an important public policy objective through class proceedings commenced in the private sector.[\[FN42\]](#)

Similar considerations apply in the present case.

Representative Plaintiff

149 One of the requirements for certification of an action as a class proceeding is that there be a person who is prepared to act as the representative plaintiff and who is able to fairly and adequately represent the interests of the class. There are three separate considerations to be addressed under this requirement.

150 First, the proposed representative plaintiff must be able to fairly and adequately represent the interests of all members of the class. In order for a claim to raise issues that may be common for all class members, for purposes of an application for certification under the *Act*, each member of the putative class must have at least a "colourable" claim against the defendant.[\[FN43\]](#) In this case, submits Bayer, the proposed representative plaintiff, Patrick Wheadon, has not shown that he has such a colourable claim against Bayer.

151 Wheadon has testified that he experienced muscle pain after first taking Baycol in 1999, that he resumed Baycol use in January 2000 and that he stopped taking Baycol in August 2001 after his doctor told him that it had been withdrawn from the market. He has testified that he has ongoing muscle pain to the present. Wheadon up to this point has refused to produce any records concerning his medical conditions. Bayer submits there is no evidence that Wheadon suffered from rhabdomyolysis or that his alleged muscle pain is related to Baycol.

152 Bayer argues the unchallenged medical evidence establishes that where myalgia is truly statin related, it disappears promptly on discontinuation of the statin; so myalgia that does not so resolve is not caused by the statin. Therefore, says Bayer, the pain from which Wheadon suffers was not caused by Baycol and he has provided no evidence to support membership in any properly defined class of persons with claims against Bayer.

153 I have already dealt with this argument above where I found that Bayer is prematurely asking the Court to take a position on the merits of Wheadon's claim that Baycol caused his myalgia. That is not an appropriate approach where Plaintiffs have not yet had adequate opportunity to retain experts and challenge Bayer's assertion. Also, the evidence presented by Bayer does not support so definite a statement. Dr. Leiter's affidavit speaks of myalgia "typically" or "usually" resolving after Baycol is continued.[\[FN44\]](#)

154 The second consideration is whether the proposed representative plaintiff has produced a litigation plan that sets out a workable method of advancing the action on behalf of the class. Bayer submits that the litigation plan proposed by the Plaintiffs is inadequate and unworkable. The litigation plan is often an integral part of the preferability analysis.

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

As stated by Winkler J. in *Caputo*, "in more complex cases, it is only when the court has a proper litigation plan before it that it is in a position to fully appreciate the implications of '>preferability' as it pertains to manageability, efficiency and fairness".

155 Rule 7A.07 of the *Rules of the Supreme Court, 1986* says certain matters must be included in the plan. Bayer submits the plan proposed by the Plaintiffs does not adequately address the matters required. In particular, Bayer says:

(i) The plan does not deal with the many and diverse individual issues that are particular to the claims of each person in relation to liability issues, even before issues of damages need to be addressed.

(ii) The statement of the methods of discovery and obtaining other information relevant to the proceeding does not explain how issues relating to production of documents, individual examinations for discovery, and obtaining expert evidence will be conducted for the individual proceedings that will be necessary even if the plaintiffs succeed on any common issues trial. Because the proposed class definition would include all users of Baycol who assert injury, there will undoubtedly be many types of injuries asserted, which will require different types of medical expertise. The proposed plan does not address how the required experts will be identified and retained. The only suggestion appears to be that the usual proceedings will be followed, just like any other civil lawsuit.

(iii) The plan proposed by the plaintiffs purports to address the potential difficulties and complications in resolving individual claims once common issues have been decided by suggesting that individual "damages and causation" will have to be determined through individual hearings. No particulars are provided to address how the individual issues relating to liability and damages will be handled, other than simply suggesting that the usual procedures be followed.

(iv) No statement is made for the proposed timing of the various stages of the proceedings, other than that there will be periodic case management conferences.

156 Bayer argues the proposal for dealing with the individual issues that will arise in the context of numerous and diverse injury claims is, therefore, wholly inadequate. Bayer says a proper plan should contain, at a minimum, an analysis of the resources required to litigate the class members claims to conclusion, and some indication that the resources available are sufficiently commensurate given the size and complexity of the proposed class and the issues to be determined. The plan should satisfy the Court as to how the resources available to the Plaintiffs can be brought to bear to ensure that the litigation can be conducted in such a way so as to protect the interests of the class members. The plan should specify the need for experts and, if needed, how those experts are to be identified and retained. The plan should address whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries. The plan ought to address what is proposed for resolving individual issues and for how damages or other forms of relief are to be assessed, if liability is determined. Bayer submits the Plaintiffs' plan fails to satisfy these requirements.

157 The purpose of the litigation plan has been described as follows:

The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendment as the case proceeds and the nature of the individual issues are demonstrated by the class members. [\[FN45\]](#)

158 In short, the litigation plan need only provide at the certification stage a reasonable framework for the issues

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

which are reasonably expected to arise as the case proceeds.[\[FN46\]](#)*The Plaintiffs' plan achieves this.*

159 The diversity of individual claims will be moderated by the nature of the injuries alleged in the Statement of Claim. Granted there are many individual issues to be resolved. But, as previously noted, I am satisfied this is not a case where one may say, as in *Hollick*, that the common issues are negligible in comparison to the individual ones. Resolution of common issues will significantly advance the litigation. The problems raised by Bayer can be dealt with through proper case management.

160 Wheadon has produced a reasonable litigation plan. The plan details the steps needed to resolve this litigation and to provide notice to the class. The plan is consistent with litigation plans approved in other product liability class actions.[\[FN47\]](#)

161 The third consideration is whether the proposed representative plaintiff has an interest that is in conflict with the interests of other class members. The class as defined would include persons with diverse complaints and differing interests and Bayer submits it is not capable of being represented by one person. Bayer argues the interests of those persons who suffered from rhabdomyolysis is likely to conflict with the interests of those persons who took Baycol and did not experience rhabdomyolysis. This is particularly apparent here, where the representative Plaintiff has objected to the exclusion from the proceeding of those who qualify for settlement, even though the settlement terms are acknowledged to be fair. Bayer says the requirement for certification that there be a person who is able to fairly and adequately represent the interests of the class, without an interest conflicting with the interests of other class members, has not been satisfied.

162 The Plaintiffs argue the test of a representative plaintiff's "adequacy" is judged by whether he will "vigorously prosecute" the action for the benefit of class members and Wheadon has already shown he will do this. He has hired experienced counsel to see this action through to a resolution. He has successfully opposed attempts by the Defendant before this Court and the Court of Appeal to have this action dismissed.[\[FN48\]](#)

163 The test for whether a representative plaintiff is adequate has been described by courts as follows:

. . . the most important considerations in determining whether a plaintiff was appropriate were whether there was a common interest with other class members and whether the representative plaintiff would 'vigorously prosecute' the claim. It has been established that there is a common interest and I can see no reason why the representative plaintiff would not vigorously prosecute the claim. Any individual plaintiffs who feel that the representative plaintiffs would not represent them may opt out of the class proceeding and pursue individual actions.[\[FN49\]](#)

164 The *Act* does not have any requirement that the claims of the representative plaintiff be "typical" of the claims of other class members. This is an American concept which has been rejected by Canadian legislators and courts. The fact that different class members may, for example, have suffered different injuries is a matter for subsequent individualized damage hearings and is not an obstacle to the appointment of a representative plaintiff.[\[FN50\]](#)

165 Our Rule 7A.04(5) requires that there be a separate representative plaintiff for the sub-class of non-residents. I am satisfied that McCullough's period of residence in Nova Scotia and his being prescribed and ingesting Baycol there is a sufficient connection with that Province to justify his acting as representative Plaintiff for the Atlantic Class.

(b) Whether there should be a stay

166 The Plaintiffs seek certification of a class comprised of those residents of Newfoundland and Labrador who were prescribed and ingested Baycol and who claim personal injuries as a result and those residents of Nova Scotia, New Brunswick and Prince Edward Island who were prescribed and ingested Baycol, who claim personal injuries as a result and who opt in to this proceeding, together with classes of persons who have a derivative claim on account of a

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

family relationship with such claimants.

167 This action is one of six class actions that are pending in Canada that relate to Baycol. In addition to this action, class actions have been brought in Ontario, British Columbia, Saskatchewan, Quebec and Manitoba. The class action in Ontario names Bayer, Bayer A.G., Bayer Corporation and Fournier Pharma Inc., the co-promoter of Baycol in Canada, as defendants and seeks certification of a national class, excluding residents of British Columbia and Quebec. The class action in Quebec names Bayer and Bayer A.G. as defendants. In the actions brought in British Columbia, Manitoba, Saskatchewan and Newfoundland and Labrador, the only defendant is Bayer. Bayer is a wholly owned subsidiary of Bayer A.G. and is headquartered in Toronto. The Manitoba action brought against Bayer seeks a multi-Provincial class that would include residents of Nova Scotia, New Brunswick and Prince Edward Island but which currently seeks to exclude residents of Newfoundland and Labrador.

168 The Ontario, Quebec and British Columbia actions have been settled, subject to the approval of the courts in these provinces, on terms that will provide compensation for general damages and loss of income claims of all residents of Canada, except British Columbia, who took Baycol and contemporaneously suffered from rhabdomyolysis, as defined in the settlement agreements. Counsel for the Plaintiffs in the Ontario, Quebec and British Columbia actions have all agreed that, based upon their analyses of the facts and law applicable to the claims of those who ingested Baycol, the motions for certification in the Ontario and British Columbia actions and the motion for authorization to commence a class proceeding in the Quebec action should be dismissed to the extent that they have been brought on behalf of those who ingested Baycol but did not suffer from rhabdomyolysis, as defined in the settlement agreement, contemporaneously with their ingestion of Baycol.

169 Counsel for the Plaintiffs in the present action have accepted that the compensatory payments offered to those who qualify to receive them under the settlement of the Ontario and the Quebec actions are reasonable, and they have recommended to their client who qualifies to receive such payments that she accept.

170 Rule 7A.04(6), empowers this Court to certify a class action regardless of what has occurred in another province. It provides:

7A.04(6) Where it appears that a class or representative proceeding covering all or a part of the matters to be dealt with in a class proceeding in this province has been certified in another jurisdiction in Canada, the court in considering whether and to what extent to grant the certification application

- (a) may consider whether it would be appropriate to define the class as excluding the class certified in the other jurisdiction or as excluding persons who do not opt out of the other proceeding;
- (b) may consider whether the other jurisdiction is a more convenient forum for the matter, and where the interests of the class resident in this province can be adequately represented in the other proceeding by the resident class members opting into that proceeding, stay the application;
- (c) may grant the application without reference to the other proceeding; or
- (d) make such other disposition as may be desirable.

171 In addition to this Rule, I must consider the Supreme Court of Canada decision in [Morguard Investments Ltd. v. De Savoye](#)[FN51], where the Court held that courts in one province should give "full faith and credit" to the judgments given by a Court in another province or territory, while weighing the order and security concerns supporting this approach against fairness to the parties.

172 The Supreme Court decided permitting suit where there is a real and substantial connection with the action

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

provides a reasonable balance between the rights of the parties.

173 I am satisfied that both Ontario and Newfoundland and Labrador have a real and substantial connection with the alleged injuries from use of Baycol. The Ontario Court appears to have appropriately exercised jurisdiction up to this point in the litigation. While there is as yet no order approving the Ontario settlement agreement, the matter shall be before the Ontario Court on April 21, 2004.

174 I must consider the problems that may arise for parties in the Ontario action if an order certifying the present action is made in this Court. As noted in paragraph 15 above, the Ontario settlement agreement will be null and void. Counsel for the intervenor and for Bayer have urged that I stay my decision to await the Ontario decision.

175 On March 8, 2004, before the application of the Intervenor, I dismissed an application by Bayer to adjourn the hearing of this application for certification. March 29th had been set for the commencement of the hearing. An adjournment would have meant that, because of scheduling difficulties and the unavailability of courtrooms, this hearing probably would not have proceeded until the fall of 2004, even if the Ontario approval process had been completed before June 30th. I decided on a balance of convenience, considering the potential for significant delay and the fact that many of the Plaintiffs are elderly, that the fairer course of action was to proceed with the hearing and permit the present proceeding to move along while matters develop in Ontario. I left open for fuller argument at the hearing the matter of prejudice to parties in Ontario because of the possibility of voiding their settlement agreement.

176 Our Rule 7A.04(6) recognizes the possibility for conflicting decisions in other jurisdictions. It provides for the exercise of a wide discretion by judges in this Court in resolving possible conflicts. The more convenient forum and adequate representation for class members resident in this Province are factors expressly noted as significant in the exercise of this discretion. The directions of the Supreme Court in *Morguard* must also be considered.

177 On the application of the *Morguard* principle I find helpful the comments of Hugessen J. of the Federal court in [Always Travel Inc. v. Air Canada](#)[FN52]:

. . . it is my view that the proper attitude of respectful cooperation which this Court should have and does have to judgments of the Ontario Superior Court of Justice will require that, as a matter of course, in virtually every case where an order is given by a provincial superior court in the exercise of its CCAA jurisdiction, and that order requests this Court's aid, this Court will give such aid on proper application being made.

178 It is with the attitude of respectful cooperation that I conclude I should await further developments in the Ontario Court before finalizing an order to certify the present action as a class action. I have given my reasons why I believe certification should eventually be available to the Plaintiffs in this Province. This should permit the parties to properly plan so as to avoid undue delay. Depending upon the Ontario hearing, at which Plaintiffs' counsel will be seeking to make representations on their behalf, and depending upon the consequent Ontario order, it may become desirable to amend the proposed class to exclude those who may benefit from the Ontario settlement agreement. Also, the position taken by the Ontario Court on the clause providing for the voiding of the agreement in the event of certification in this Court or elsewhere may have to be considered in the light of this Court's responsibility, under Rule 7A.04(6)(b), to ensure adequate representation in proceedings for residents of this Province. Accordingly, I conclude the proper approach is to now enter an interim stay in this certification application, with leave to either party to apply to have the proposed certification order or an amendment of it issued as a formal order of this Court upon receipt of the Ontario decision on approval of the settlement agreement or on May 31, 2004, whichever is the earlier.

Notice

179 The issue of this Court's approval of the form and content of official notice to the class, and the issue of who should pay for the cost of notice, shall await this Court's formal order for class certification.

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

E. SUMMARY AND DISPOSITION

180 In summary I conclude:

(a) The Plaintiffs have satisfied the requirements for certification in that:

(i) the Plaintiffs have passed the evidentiary threshold by showing some basis in fact for the commonality of certain issues;

(ii) the Plaintiffs have properly identified a class as persons resident in Newfoundland and Labrador (and residents of the Atlantic Provinces who opt-in), who were prescribed and ingested Baycol and who claim personal injury as a result, and persons who have a derivative claim on account of a family relationship with such a claimant;

(iii) the Plaintiffs' claim raise common issues, including:

- whether Baycol causes serious side effects, and if so, the nature and extent of those side effects;
- whether Baycol was defective and/or unfit for its intended use;
- whether Baycol breached a duty of care owed to class members and, if so, when and how;
- whether the Defendant should pay punitive damages and, if so, to whom and in what amount;

(iv) the class action is the preferable procedure; and

(v) there are proper representative Plaintiffs.

(b) The certification application is stayed, however, until receipt of the Ontario decision on approval of the settlement agreement or May 31, 2004, whichever is the earlier, after which either party may apply to have the proposed certification order or an amendment of it issued as a formal order of this Court.

Application granted.

[FN1](#) *Bouchanskaia v. Bayer Inc.*, [2003 BCSC 1306](#) (B.C. S.C.).

[FN2](#) A list of some of leading certified product liability class actions includes the following: *Nantais v. Telectronics Proprietary (Canada) Ltd.*, [\(1995\), 25 O.R. \(3d\) 331](#) (Ont. Gen. Div.); leave to appeal to Div. Ct. denied [*Nantais v. Telectronics Proprietary (Canada) Ltd.*, [1995 CarswellOnt 995](#) (Ont. Gen. Div.)]; *Chace v. Crane Canada Inc.*, [\(1997\), 44 B.C.L.R. \(3d\) 264](#) (B.C. C.A.); *Ontario New Home Warranty Program v. Chevron Chemical Co.*, [\(1999\), 46 O.R. \(3d\) 130](#) (Ont. S.C.J.); *Wilson v. Servier Canada Inc.*, [\(2000\), 50 O.R. \(3d\) 219](#) (Ont. S.C.J.), leave to appeal denied, *Wilson v. Servier Canada Inc.*, [\(2000\), 52 O.R. \(3d\) 20](#) (Ont. Div. Ct.), leave to appeal to the Supreme Court denied; *Hoy v. Medtronic Inc.*, [\(2001\), 94 B.C.L.R. \(3d\) 169](#) (B.C. S.C. [In Chambers]); appeal denied, *Hoy v. Medtronic Inc.*, [2003 BCCA 316](#) (B.C. C.A.); *Harrington v. Dow Corning Corp.*, [\(2000\), 82 B.C.L.R. \(3d\) 1](#) (B.C. C.A.); leave to appeal to the Supreme Court of Canada denied.; *Campbell v. Flexwatt Corp.*, [\(1997\), 44 B.C.L.R. \(3d\) 343](#) (B.C. C.A.); leave to appeal to the Supreme Court of Canada denied [*Campbell v. Flexwatt Corp.*, [\(1998\), 228 N.R. 197 \(note\)](#) (S.C.C.)]; *Bendall v. McGhan Medical Corp.*, [\(1993\), 14 O.R. \(3d\) 734](#) (Ont. Gen. Div.), leave to appeal dismissed *Bendall v. McGhan Medical Corp.*, [\[1993\] O.J. No. 4210](#) (Ont. Gen. Div.); *Endean v. Canadian Red Cross Society*, [\(1997\), 36 B.C.L.R. \(3d\) 350](#) (B.C. S.C.); *Dalhuisen (Guardian ad litem of) v. Maxim's Bakery Ltd.*, [\[2002\]](#)

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

[B.C.J. No. 729](#) (B.C. S.C. [In Chambers]); *Olsen v. Behr Processing Corp.*, [\[2003\] B.C.J. No. 1887](#) (B.C. S.C. [In Chambers]); *Reid v. Ford Motor Co.*, [\[2003\] B.C.J. No. 2489](#) (B.C. S.C.); *Andersen v. St. Jude Medical Inc.*, [\[2003\] O.J. No. 3556](#) (Ont. S.C.J.); *Fakhri v. Alfalfa's Canada Inc.*, [2003 BCSC 1717](#) (B.C. S.C.).

[FN3](#) See, [Ontario New Home Warranty Program](#), note 3 above, para. 95.

[FN4](#) In *Western Canadian Shopping Centres Inc. v. Dutton*, [\[2001\] 2 S.C.R. 534](#) (S.C.C.), pp.548-50, paras. 26-29.

[FN5](#) *Hollick v. Metropolitan Toronto (Municipality)*, [\[2001\] 3 S.C.R. 158](#) (S.C.C.), p. 173, para. 21.

[FN6](#) For example, see *Carom v. Bre-X Minerals Ltd.* (2000), [51 O.R. \(3d\) 236](#) (Ont. C.A.), paras. 40-42, leave to appeal to the Supreme Court of Canada denied [*Carom v. Bre-X Minerals Ltd.*, [2001 CarswellOnt 3609](#) (S.C.C.)]; and *Hollick*, note 6 above, p. 169, para. 14.

[FN7](#) *Hollick*, p. 171, para. 16.

[FN8](#) *Parly v. Bayer Inc.*, [\[2003\] N.J. No. 210](#) (N.L. T.D.), at para. 48.

[FN9](#) *Taub v. Manufacturers Life Insurance Co.* (1998), [40 O.R. \(3d\) 379](#) (Ont. Gen. Div.).

[FN10](#) **Section 6(1) of our Act corresponds.**

[FN11](#) *Hollick*, note 6 above, p. 174, para. 22, and p. 175, para. 25.

[FN12](#) See, p. 179, para. 32.

[FN13](#) *Hollick*, note 6 above, pp. 175-76, para. 21, and [Bouchanskaia](#), note 2 above, paras. 78-9.

[FN14](#) Note 5 above, p. 554, para. 38.

[FN15](#) *Caputo v. Imperial Tobacco Ltd.*, [\[2004\] O.J. No. 299](#) (Ont. S.C.J.), paras. 44-45.

[FN16](#) *Hollick*, note 6 above, p. 171, para. 17.

[FN17](#) *Western Canada Shopping Centres*, p. 554, para. 38.

[FN18](#) [\[2001\] 3 S.C.R. 184](#) (S.C.C.).

[FN19](#) Relying upon [Hollick](#), note 6 above, paras. 20-21.

[FN20](#) [Bouchanskaia](#), note 2 above, para. 81

[FN21](#) *Hollick*, note 6 above, para. 20.

[FN22](#) *Craig Jones, Theory of Class Actions* (2003), p. 123.

[FN23](#) *Campbell v. Flexwatt Corp.* (1997), [44 B.C.L.R. \(3d\) 343](#) (B.C. C.A.), p. 359; leave to appeal to the Supreme Court of Canada denied. See also *Carom v. Bre-X Minerals Ltd.*, note 7 above, paras. 40-42; leave to appeal to the

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

Supreme Court of Canada denied.

[FN24Hollick](#), note 6 above, paras. 16, 19, 22-25 and [Caputo](#), note 16 above, para. 44.

[FN25](#)Note 3 above.

[FN26](#) Note 2 above, paras. 90-91.

[FN27](#)*Bywater v. Toronto Transit Commission* (1998), [27 C.P.C. \(4th\) 172](#) (Ont. Gen. Div.).

[FN28](#)(2000), [82 B.C.L.R. \(3d\) 1](#) (B.C. C.A.), paras. 42-3.

[FN29](#)Note 19 above, para. 31.

[FN30](#) For example, *Bittner v. Louisiana-Pacific Corp.* (1997), [43 B.C.L.R. \(3d\) 324](#) (B.C. S.C. [In Chambers]), para. 51; *Samos Investments Inc. v. Pattison* (2001), [22 B.L.R. \(3d\) 46](#) (B.C. S.C.), paras. 75 - 110; *Williams v. Mutual Life Assurance Co. of Canada* (2000), [51 O.R. \(3d\) 54](#) (Ont. S.C.J.), para. 22; affirmed [*Kumar v. Mutual Life Assurance Co. of Canada*, [\[2001\] O.J. No. 4952](#) (Ont. Div. Ct.)].

[FN31](#)Note 2 above, paras. 104-107.

[FN32](#) *Bouchanskaia*, note 4 above, para. 114-5. See also, *Wilson v. Servier*, note 3 above.

[FN33](#) *Wilson v. Servier*, note 3 above, paras. 111-12.

[FN34](#)Note 16 above.

[FN35](#) See, for example, *Rumley v. British Columbia*, note 19 above, para. 48; and *Chace v. Crane Canada Inc.* (1997), [44 B.C.L.R. \(3d\) 264](#) (B.C. C.A.), paras. 23-27.

[FN36](#)*Hollick*, note 6 above, para. 30.

[FN37](#) *Rumley v. British Columbia*, note 19 above, para. 45.

[FN38](#)Note 3 above.

[FN39](#) Note 7 above, para. 41. See also, *Olsen v. Behr Processing Corp.*, [\[2003\] B.C.J. No. 1887](#) (B.C. S.C. [In Chambers]). I prefer the Olsen approach to that in *Garipey v. Shell Oil Co.*, [\[2002\] O.J. No. 2766](#) (Ont. S.C.J.).

[FN40](#)*Bouchanskaia*, note 2 above, para. 169.

[FN41](#)Note 5 above, para. 29.

[FN42](#)*Wilson v. Servier*, note 3 above, para. 126. See also, *Western Canadian Shopping Centres v. Dutton*, note 5 above, para. 29.

[FN43](#)*Hollick*, note 6 above, paras. 16, 19, 22-25.

2004 CarswellNfld 105, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179, 703 A.P.R. 179, 46 C.P.C. (5th) 155

[FN44](#) On this question, as on others relating to the common issues, Bayer's submissions would be more appropriate on a motion for summary judgment. See the comments of Cullity J. in *Andersen v. St. Jude Medical Inc.*, [\[2003\] O.J. No. 3556](#) (Ont. S.C.J.), para. 46.

[FN45](#) *Fakhri v. Alfalfa's Canada Inc.*, [2003 BCSC 1717](#) (B.C. S.C.), para. 77.

[FN46](#) *Dalhuisen (Guardian ad litem of) v. Maxim's Bakery Ltd.*, [\[2002\] B.C.J. No. 729](#) (B.C. S.C. [In Chambers])

[FN47](#) See, for example, *Bouchanskaia*, note 2 above, and *Wilson*, note 3 above.

[FN48](#) *Pardy v. Bayer Inc.*, [2003] N.J. No. 182 (N.L. T.D.); leave to appeal denied, *Pardy v. Bayer Inc.*, [2003 NLCA 45](#) (Nfld. C.A.).

[FN49](#) *Campbell v. Flexwatt Corp.*, [\(1997\), 44 B.C.L.R. \(3d\) 343](#) (B.C. C.A.), p. 364.

[FN50](#) *Nantais v. Telectronics Proprietary (Canada) Ltd.*, [\(1995\), 25 O.R. \(3d\) 331](#) (Ont. Gen. Div.), p. 349; leave to appeal to Div. Ct. denied. See also, *Campbell v. Flexwatt Corp.*, [\(1997\), 44 B.C.L.R. \(3d\) 343](#) (B.C. C.A.), note 7 above, paras. 44-5, 69-75, and *Wilson v. Servier*, note 3 above.

[FN51](#) [\[1990\] 3 S.C.R. 1077](#) (S.C.C.).

[FN52](#) [2003 FCT 707](#) (Fed. T.D.), para. 11.

END OF DOCUMENT