

subsequently proposed by the plaintiffs was challenged by the defendants, the hearing of the certification motion resumed on June 12.

[2] The amendments were in response to my criticism that the original plan did not contemplate the existence of issues of fact - including issues of causation - that may determine whether a class member has a compensable claim. These issues are individual issues that will arise only in the event that common issues - and particularly the common issue relating to negligence - are decided in favour of the class. I indicated that any procedures proposed for determining these individual issues must not deprive the defendants of the right to participate in the process and, if desired, to oppose the claims of class members to have the issues decided in their favour.

[3] The revised litigation plan consists of two documents of which one - a Revised Compensation Plan - is a schedule to the other and incorporated in it. As Mr. Champion commented, the compensation plan is misleadingly named to the extent that it deals with issues of causation of harm on which liability may depend, as well as those relating to the assessment of damages.

[4] While defendants' counsel submitted that the revised litigation plan is seriously deficient in its failure to deal with the manner in which the trial of common issues would be conducted, their most elaborate criticisms - and those most responsive to the criticisms in my earlier reasons - were directed at the procedure for resolving the individual issues.

[5] The compensation plan is still clumsily drafted in that, in order to indicate that the individual issues relating to liability are to be dealt with in accordance with the same procedures that will be followed in assessing damages, it describes them as part of the assessment. The intention is now, however, reasonably clear: each task is to be dealt with on a reference ordered by the trial judge pursuant to section 25 (1) (b) of the CPA. As, on such a reference, the "rules of court" are to apply, the referee is to give reasons for decisions and these are to be filed with the court. Unless a notice of opposition is filed by a Patient Class Member, or by the defendants within 15 days, the decisions are to be deemed to be confirmed.

[6] The defendants are to be entitled to participate in the decision-making process conducted by the referee and, if they do so, they are to receive copies of all claim forms submitted by class members. On notice to the parties, the referee's proposed procedures must first be submitted to the court for approval.

[7] Defendants' counsel raised strong opposition to the proposed procedure. In Mr. Champion's submission, fairness to their clients required that issues of causation and any other issues that affected liability should be disposed of by trials conducted in accordance with the *Rules of Civil Procedure*.

[8] While, in view of the general reference to individual issues in section 25 (1) of the CPA, and the express provision for references in section 25 (1) (b), Mr. Champion could not deny that the proposed procedure was contemplated by the legislation, he submitted that its adoption for

the purpose of issues of liability could not be an acceptable "workable method of advancing the proceeding on behalf of the class" within the meaning of section 5 (1) (e) (ii).

[9] It is quite clear that the procedures for resolving individual issues of any kind fall within what Winkler C.J.O. in *Cassano v. Toronto-Dominion Bank*, [2007] O.J. No. 4406 (C.A.), at para. 64, described as the "broad jurisdiction" conferred by section 25 on the judge that presides at the trial of common issues. This jurisdiction, he commented, was amplified by the provisions of section 25 (3). Sections 25 (2) and (3) are as follows:

(2). The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

(3). In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

(a) dispense with any procedural step that it considers unnecessary; and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and a means of proof, that it considers appropriate.

[10] The jurisdiction of the trial judge is not constrained by the contents of the litigation plan presented by the plaintiffs for the purpose of certification. The requirement of a workable plan serves a different purpose than the provisions of section 25. It is intended to assist the court in determining whether a proceeding should be certified - whether it should be permitted to proceed as a class action to a trial of common issues. It is not intended to, and it does not, determine the procedures that will actually be employed in resolving individual issues. Nor does it require the plaintiffs to choose the most appropriate procedures. It is usually imperative that it should address such procedures, but if those proposed are within the powers conferred on the trial judge in section 25, and if they will provide a manageable method of resolving the issues, this will ordinarily be sufficient to satisfy the purpose behind the requirement of a litigation plan as a precondition for certification. In this case, I am not prepared to find that the adoption of the reference procedure by the trial judge would fall outside the scope of the jurisdiction under section 25, or be an abuse of the discretion inherent in it.

[11] In short, at the certification stage, I believe it is sufficient if the court decides, on a balance of probabilities, that a proposed plan for dealing with individual issues is a manageable - workable - method of achieving the goals of the CPA, and that its acceptance falls within the scope of the trial judge's discretionary jurisdiction under section 25. It is not the function of the motion judge to decide how the discretion should be exercised. In the ultimate analysis, that seemed to me to be the question at which the submissions of defendants' counsel were directed

and, in my opinion, the submissions would more properly be advanced to the trial judge if, and after, the common issues are decided in favour of the class.

[12] There is ample precedent in this jurisdiction for procedures similar to that involving a reference to be approved by the court for the purpose of implementing settlements of class proceedings. This, of course, does not address the situation where the defendants do not consent to the proposed procedures, but it supports the submission of Mr. Strosberg that the proposed procedure is workable in the sense that it could be employed to determine the individual issues with an acceptable level of efficiency.

[13] As I have indicated, the jurisdiction under section 25 is not, in terms, limited to the assessment of damages on an individual basis. The absence of any such limitation was recognized by Winkler C.J.O. in his judgment in *Cassano*. The proposition that trials conducted under the *Rules of Civil Procedure* are mandated for individual issues relating to liability is, in my opinion, not merely without support in the statute but, also, inconsistent with the thrust and purpose of section 25. A trial of common issues is the linchpin of the procedure under the CPA. It is consistent with the scheme and objectives of the legislation and the wide discretionary powers conferred by sections 12 and 25, in particular, that there should be considerable flexibility in the choice of methods of resolving individual issues. To the extent that, at times in his submissions, Mr. Champion appeared to suggest that the test for an adequate litigation plan is more strict than the approach that might properly be adopted by the trial judge, I do not think that can possibly be correct.

[14] In my judgment, the revised plan deals satisfactorily with the deficiencies in the process for determining individual issues. The court would have ample powers and authority under section 25 of the CPA, and Rules 54 and 55, to give directions if any other specific procedural issues arose.

[15] In addition to their submissions on the inadequacies of the procedure for resolving the individual issues, defendants' counsel submitted that the plan was deficient in its failure to address the conduct of the common issues trial. This relates to their submission at the previous hearing that the trial would necessarily be "a monster of complexity". I rejected this submission in paragraphs 74 through 78 of the earlier reasons and, to the extent that they provide the foundation for the defendants' criticisms of the litigation plan, I continue to believe they exaggerate the difficulty of organizing and conducting the trial under the supervision - and subject to the discretionary powers - of the trial judge.

[16] More directly pertinent for the present purpose is the suggestion that, irrespective of the powers of the trial judge, the defendants are entitled at this stage to be provided with additional details of the manner in which the plaintiffs will present their case at the common issues trial. I do not accept this proposition.

[17] The purpose of a litigation plan is to assist the court to decide, on a balance of probabilities, whether the objectives of the CPA will be achieved by an order certifying the proceeding. The purpose is not to help the defendants to prepare for the trial - and certainly not

to enable them to plead. They have chosen not to file statements of defence prior to certification and, apart from anything else, this must, in my opinion, have some impact on the extent to which the plaintiffs are required at this stage to make decisions relating to the conduct of the trial.

[18] The CPA contains very little about the conduct of a trial of common issues and the steps leading up to it. Subject to the provisions of section 11 that require common issues for a class, or subclass, to be determined together, and the specific rules relating to the participation, discovery and examination of class members in sections 14 - 16, the assumption is that the trial will be conducted in accordance with the *Rules of Civil Procedure* as modified by the court under the broad discretionary powers conferred by those sections and section 12. This is also implicit in the proposed litigation plan which, as well as providing for the required notices to class members and for opting out procedures, contemplates that the court will be asked to set a timetable for the completion of pleadings, documentary productions, examinations for discovery and the delivery of expert reports. The report also contains details of productions the plaintiffs will seek and of those they will provide; their present intentions with respect to the examinations for discovery they will wish to conduct; and the identity of an expert witness they propose to call. The plan contemplates that it may be revised from time to time with the approval of the court, and that the court may be asked for an order clarifying or redefining the common issues after examinations for discovery and the exchange of expert reports have been completed.

[19] In my judgment, the revised litigation plan contains sufficient detail of the future conduct of the litigation as proposed by the plaintiffs. Even if statements of defence had been delivered, I do not believe the plaintiffs should now be compelled to disclose – or, more likely, to speculate about – the strategies they are likely to pursue at the trial of common issues. On the basis of the record as it stands at present, I am also satisfied that the revised plan sets out an acceptable and workable method of advancing the proceeding on behalf of the class as required by section 5 (1) (e) (ii).

[20] Finally defendants' counsel suggested that, in the light of the recent decision of the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd*, [2008] S.C.J. No. 27, I might wish to reconsider the following finding in paragraph 39 of my earlier reasons:

One of the two heads of damages that defendants' counsel criticized as being not compensable at law was a claim in respect of "emotional distress". In earlier versions of the statement of claim this head was so described without elaboration. In the pleading in its present form the same words appear with the addition of the words "including mental distress, anger, depression and anxiety". The additional words were considered acceptable in a pleading by the Supreme Court of Canada in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, at para 41, and, with that guidance, I make the same finding this case. In deference to Mr. Champion's learned and extensive review of the prior case law, I should indicate that I adhere to the views expressed in *Healey v. Lakeridge Health Corporation*, [2006] O. J. No. 4277 (S.C.J.), at paras. 81 - 83.

[21] Mr. Campion referred, in particular, to the comments of McLachlin C.J. in paras. 8 - 10 of the court's reasons for judgment in *Mustapha*. After referring to the "elusive and arguably artificial" distinction between physical and mental injury in the context of tort actions, the Chief Justice stated:

This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: ... The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. ... Quite simply, minor and transient upsets do not constitute personal injury, and hence do not amount to damage.

On the findings of the trial judge, supported by medical evidence, Mr. Mustapha developed a major depressive disorder with associated phobia and anxiety. The psychiatric illness was debilitating and had a significant impact on his life; it qualifies as a personal injury at law. It follows that Mr. Mustapha has established that he sustained damage.

[22] Unlike the position in *Mustapha*, the issue in this case concerns the adequacy of the pleading. For this purpose, I do not understand the statements of the learned Chief Justice to be in conflict with - or to represent a step back from - the court's acceptance of the pleading in *Odhavji Estate*. In that case, it was held that the question whether "psychiatric damage in the form of anxiety or depression" was "of sufficient magnitude to warrant compensation" was a matter to be determined at trial and that -

[a]t the pleading stage, it is sufficient that the statement of claim alleges that the plaintiffs have suffered mental distress, anger, depression and anxiety as a consequence of the alleged misconduct (para. 41).

[23] In consequence, I see no reason to modify the finding made in the earlier reasons.

[24] As, in my judgment, the revised litigation plan satisfies the requirement in section 5 (1) (e) (ii) of the CPA, there will be an order certifying the proceeding.

[25] Prior to the resumption of the hearing, the defendants had declined to discuss the plaintiffs' proposed revisions to the litigation plan and insisted - as they were entitled to - that the onus was on the plaintiffs to satisfy the court that the revisions were satisfactory. I trust, however, that the parties will be able to agree on any revisions to the draft order that are required as a consequence of the conclusions I have reached. If they are unable to do so, they should obtain an appointment to settle the terms of the order.

[26] Any submissions on the costs of the motion are to be made in writing within 21 days of the release of these reasons. Written reply submissions may be made within a further seven days.


CULLITY J.

Released: June 17, 2008

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ADRIEN LEFRANCOIS, SALLY ANNE
GEORGIU, GEORGE GEORGIU, CYNTHIA
ANN QUENNEVILLE, ROBERT
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MADHURI SINGH, MARGARET ADELLA
FITZGEORGE, WILLIAM FITZGEORGE,
HERBERT BRUCE HERON AND MADELEINE
MARIE HERON

Plaintiffs/Moving Parties

- and -

GUIDANT CORPORATION, GUIDANT
CANADA CORPORATION, GUIDANT SALES
CORPORATION AND CARDIAC
PACEMAKERS INC.

Defendants/Respondents

SUPPLEMENTAL REASONS FOR DECISION

CULLITY J.

Released: June 17, 2008