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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
ANDREA HEWARD, ANDREW CHARLES HEWARD, KELLY HUTCHINS, DARLENE HUTCHINS, DANIEL WELLS AND NANCY WELLS	)	***Michael A. Eizenga, Michael J. Peerless*** and ***Colin P. Stevenson*** --for the Plaintiffs
Plaintiffs	)	
- and -	)	
ELI LILLY & COMPANY AND ELI LILLY CANADA INC	)	***David S. Morritt, Sonia L. Bjorkquist*** and ***Craig T. Lockwood***-- for the Defendants
Defendants	)	
	)	**HEARD:** November 23, 24, 25 and 27, 2006

REASONS FOR DECISION

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6

CULLITY J.

[1] The plaintiffs have moved for certification of this action commenced under the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("CPA") against the defendants Eli Lilly & Company ("Eli US") and Eli Lilly Canada Inc ("Eli Canada"). The defendants oppose the motion on the ground that the requirements for certification in section 5 (1) of the CPA are not satisfied.

[2] No statement of defence has been delivered but it is pleaded in the statement of claim that Eli US. is incorporated in the state of Indiana, in the United States of America, and that it

manufactures Zyprexa - an anti-psychotic medication - and distributes it in Canada and throughout the world. Eli Canada is a Canadian corporation that is an affiliate or subsidiary of Eli US and has its head Office in Toronto and other offices across Canada. It is alleged that Eli Canada and Eli US carry on business jointly in and throughout Canada and that, together, they researched, developed, tested, manufactured, marketed, distributed and sold Zyprexa for use by patients throughout Ontario and Canada.

[3] None of the above allegations was contested in the material filed for the purpose of the motion and, for such purpose, I will assume that they are correct.

[4] Zyprexa is one of a number of "second-generation" or "atypical" anti-psychotic medications available on prescription in Canada for treating schizophrenia, related psychotic disorders and bipolar disorders. Such medications were developed after it was discovered that the use of a "first generation" of anti-psychotic drugs was accompanied by debilitating and often disfiguring side effects and symptoms. It is not disputed that Zyprexa has proven to be a very effective atypical anti-psychotic drug that is prescribed widely throughout the world. In 1996 it was approved by Health Canada as a prescription medication for the treatment of schizophrenia and related psychotic disorders. In 2003 and 2004 such approval was extended to the acute and maintenance treatment of bipolar disorders. Such approvals have not been withdrawn and Zyprexa is still marketed, distributed and prescribed across Canada.

[5] In addition to the specific disorders for which Zyprexa has been approved by Health Canada, the medication has been prescribed for the control of agitation, anxiety, aggression and behavioural disturbance occurring in the context of non-psychotic disorders. According to the evidence of Dr Pierre Chue - an associate clinical professor in the department of psychiatry at the University of Alberta whose qualifications to provide relevant expert opinions are impressive and were not challenged - the use of Zyprexa for these purposes reflects a widespread and generally accepted use of anti-psychotics of which pharmaceutical companies such as the defendants are generally well aware.

[6] In their statement of claim, the plaintiffs do not challenge the widespread use of Zyprexa - or its effectiveness as treatment - for the above purposes. Their counsel described it as a good drug with a fatal flaw. The substance of their claims is that, to the knowledge of the defendants, the use of the drug gives rise to a significantly increased risk of diabetes and a variety of related complaints including hyperglycemia, pancreatitis, other blood sugar disorders, weight gain and, in elderly patients, strokes - and that the defendants have consistently failed to disclose to, or warn, Canadian patients and their physicians of these risks. They claim compensatory and punitive damages in respect of the alleged negligence of the defendants. In the alternative they seek an order requiring payment of the revenues realised by the defendants from the sale of Zyprexa either on the basis of unjust enrichment, or their "right to waive" the tort claim in negligence.

[7] Three of the plaintiffs - Andrea Heward, Daniel Wells and Kelly Hutchins - are alleged to have developed diabetes after being treated with Zyprexa. In the case of Heward it is pleaded expressly that her diabetes was caused by her use of Zyprexa and the negligence of the

defendants. There is no similar plea in respect of Wells and Hutchins but there is a general allegation that the plaintiffs have suffered and will continue to suffer damages as a direct result of the defendants' negligence.

[8] Each of the other three plaintiffs is a spouse of one of the above plaintiffs. Andrew Heward and Nancy Wells claim under section 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 ("FLA") while Darlene Hutchins claims under legislation in force in Alberta that permits similar derivative claims.

[9] There has been no attempt in the statement of claim to provide a precise definition of the class, or classes, that the plaintiffs seek to represent. Paragraph 17 merely states that the action is brought on behalf of the plaintiffs and "a class of persons similarly situated".

[10] Neither the CPA nor the Rules of Civil Procedure provide rules of pleading specifically applicable to class proceedings. This is consistent with the view that, although any compensatory damages sought will invariably reflect the intention to move for certification on behalf of the class, a statement of claim need - and, perhaps, should - otherwise focus primarily on the claims of the plaintiffs and allege the facts material to them. Any questions relating to the existence, nature and extent of the claims of other class members would then fall to be dealt with on a motion to certify the proceedings in the context of the inquiry into the proposed common issues and the required rational connection between them and the class definition as defined in the notice of motion. I believe that, in principle, this is the correct approach to pleading under the CPA. In my experience it is consistent with the approach most commonly adopted by plaintiffs' counsel in class proceedings although, at times, statements of claim have been drafted as if the putative class members were plaintiffs: see, for example, *Healey v. Lakeridge Hospital et al*, [2006] O.J. No. 4277 (S.C.J.), at para 26.

[11] The task of defining the class appropriately is often a fluid exercise in fine tuning. Where, as is usually the case, a definition is contained in the pleading, it is quite commonly not identical to that proposed in the notice of motion to certify the proceeding. The latter will often be disputed by defendant's counsel at the hearing, and the exact description of the class will remain uncertain until the successful conclusion of the motion when, pursuant to section 8 of the CPA, the class definition is to be included in the order of the court. It is that definition, and not any different definition, or description, in the pleadings, that will be applicable as the proceedings continue. In these circumstances, I do not think it is in the interests of a just, expeditious and inexpensive administration of justice to require that the statement of claim to be amended each time counsel is persuaded that changes to the class definition should be made.

[12] I accept that a statement of claim should contain some intelligible description of the class that the plaintiffs wish to represent. There may well be cases where a defendant can legitimately object that a more precise definition is required for it to know the case it will have to meet, and to enable it to plead in defence. In the absence of any such objection in this case, I believe the description provided – vague as it is - is acceptable.

[13] In response to the affidavit incorporating the expert opinions of Dr Chue and an affidavit of one of the lawyers in a firm acting for the plaintiffs, the defendants filed affidavits containing expert clinical opinions relating, *inter alia*, to the treatment of schizophrenia and bipolar disorders, the association of diabetes with schizophrenia, the absence of a causal connection between diabetes and treatment with Zyprexa, and the individual nature of the risk/benefit analysis required when treating bipolar and other mood disorders. They take issue with the opinions of Dr Chue on questions of causation and the risks associated with the use of Zyprexa. In addition, an affidavit of an employee of Eli Canada describes in considerable detail communications between Eli Canada and Health Canada in respect of the latter's requests for approval of Zyprexa for treating various disorders, and the risks associated with such treatment. All of this evidence is directly relevant to the merits of the litigation, and, of course, it is admissible on this motion – and has been considered - only to the limited extent that it may serve to rebut the plaintiffs' attempts to demonstrate the minimal basis of fact required to establish each of the requirements in section 5 (1) (b) through 5 (1) (e) of the CPA. I have found it - and the evidence of Dr Chue - helpful to the extent that it bears on the commonality, or lack of commonality, of the proposed common issues; the extent to which any issues that are common would advance the proceedings; the extent to which a class proceeding would be manageable and efficient; and, generally, whether such a proceeding would accord with, and advance, the objectives of the CPA and be preferable to other methods of resolving the plaintiffs' claims.

[14] The case for certifying the proceeding was very strongly, and comprehensibly, contested by counsel for the defendants on the basis of the evidence and the authorities. They left no stone unturned and, in my opinion, turned over quite a few that were extraneous to the case presented on behalf of the plaintiffs.

[15] I will deal with the requirements in section 5 (1) of the CPA in turn.

1. Section 5 (1) (a) - disclosure of a cause of action

[16] In their pleading, the plaintiffs claimed damages for negligence and, alternatively, an order - based on unjust enrichment or waiver of tort - that the defendants disgorge the revenues they have received from the sale of Zyprexa.

Negligence

[17] Counsel for the defendants quite properly conceded that, although the defendants denied the merits of the claims of negligence, the statement of claim discloses a reasonable cause of action in negligence for individuals who ingested Zyprexa for one of its "approved uses" and subsequently developed diabetes. Whether or not the treatment of the ailment from which Kelly Hutchins suffered was one of the "approved uses" to which defendants' counsel referred, material facts to support the existence of a cause of action in negligence in respect of Andrea Heward, Daniel Wells and Kelly Hutchins have, in my judgment, been pleaded notwithstanding that the causal link between Zyprexa and the diabetes suffered by Wells and Hutchins is implied rather than explicit in the statement of claim. Similarly - and reading the pleading generously -

an allegation of the defendants' reasonable foresight of such harm is, in my opinion, sufficiently implicit. I have reached this conclusion without reliance on the contents of a number of studies, articles and other documents that, in paragraph 19 (j) of the statement of claim, are cited as relevant to the defendants' knowledge that Zyprexa can have harmful side effects. As, pursuant to rule 25.06 (8), knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred, I consider the contents of the documents to have the character of evidence and not of material facts. As such, they should not have been pleaded (rule 25.06 (1)) and there can be no question of incorporating them into the statement of claim for the purpose of section 5 (1) (a) of the CPA.

[18] For the above reasons, I find that the requirement in section 5 (1) (a) is satisfied in respect of the claims in negligence asserted by the three primary plaintiffs.

[19] The submission of defendants' counsel that no cause of action in negligence can exist for class members who were treated with Zyprexa but have not developed diabetes, or one of the related complaints, is not relevant to the claims of these plaintiffs. For the reasons already given, the submission will be considered in the context of the requirements for a class in section 5 (1) (b).

[20] The adequacy of the pleading to disclose the derivative claims of Nancy Wells and Darlene Hutchins is more problematic. It is pleaded that Wells, like Andrew Heward, claims under 61 of the FLA but, unlike Heward, it is not pleaded that she suffered any damages as a result of the loss of care, guidance and companionship of her spouse, or for any other loss. The pleading is similarly deficient in connection with Darlene Hutchins who claims under similar, although not identical, legislation in Alberta. The plaintiffs are entitled to amend their pleading without leave at this stage of the proceeding. Indeed, it seems they will need to do so to replace the reference to the Domestic Relations Act of Alberta with a reference to section 2.1 of the *Tort-feasors Act*, R.S.A. 2000, c. T - 5 as well to comply with the direction of the Divisional Court in *Boulanger v. Johnson & Johnson Corp.* (2003), 64 O.R. (3d) 208 that relevant provisions of the legislation of other provinces must be set out, or incorporated, in the pleading and not, as here, simply included in the motion record.

[21] Mr Stevenson submitted that, if I were to find - as I will - that the pleading is inadequate to support the claims of Nancy Wells and Darlene Hutchins as plaintiffs, I should simply treat them as members of the proposed class and appoint Andrew Heward to represent them. I will refer to this submission later in these reasons in the context of section 5 (1) (e).

[22] Another criticism of the pleading that I believe is well-founded relates to the claims asserted on behalf of the Province of Alberta as an insurer of healthcare expenses. I was informed that while provincial health insurers in Ontario and elsewhere in Canada, other than Alberta, have subrogated claims, the relevant legislation in Alberta provides the Province with a direct action. It is not a party to the proceedings and there may be a valid objection to any attempt to add it as a plaintiff: see *Obonsawin v. Canada*, [2002] O.J. No. 2502 (S.C.J.). Plaintiffs' counsel undertook to give further consideration to this question, and any required amendments to the statement of claim. Any such amendments referring to the claim would need

to comply with the directions of the Divisional Court in *Boulanger* to which I have already referred.

Waiver of tort

[23] The plaintiffs have pleaded reliance on waiver of tort as an alternative cause of action. The relevant paragraph is as follows:

> 41. The plaintiff and plaintiff class plead in the alternative to their claim for damages that they are entitled to "waive the tort" claim in negligence and instead elect to claim payment of the revenues generated by the defendants as a result of their failure and refusal to properly bring the risks associated with Zyprexa to the attention of the plaintiff and plaintiff class, which revenues were reflected in enormous profits earned by the defendants.

[24] For this purpose, the plaintiffs relied heavily on the decision of the Divisional Court in *Serhan v. Johnson & Johnson*, [2006] O.J. No. 2421 in which it was held in somewhat similar circumstances by Epstein and Jennings JJ. (Chapnik J. dissenting) that the pleading disclosed a cause of action based on the decisions that are usually classified as cases of waiver of tort. These decisions recognise that, in certain circumstances, when tortious acts have been committed by a defendant, the person affected will be permitted to elect between the remedy of compensatory damages and an accounting for a disgorgement of profits. The tort is not waived in any meaningful sense as it provides the basis for whichever of the two remedies is chosen: *United Australia Ltd., v. Barclays Bank Ltd.,* [1941] A.C.1 (H.L.), at page 18. The use of the term "waiver of tort" has been criticised as misleading for that reason and, also, because, in the view of some learned commentators, the relevant decisions reflect a wider principle that is not confined to tortious wrongs. Despite this, it will be convenient for the present purposes to adhere to the traditional terminology.

[25] Prior to *Serhan*, the general principles governing waiver of tort had received little attention in Canadian courts. They have, however, been discussed at length by academics and other commentators whose views were referred to, and discussed, by Epstein J. in the Divisional Court. In attempting to formulate coherent principles that would explain and rationalise past decisions to accommodate the relatively recent recognition of a general law of restitution, there is no doubt that the learned commentators have greatly contributed to, and will quite properly continue to influence, its development. However, as the reasons of Epstein J. indicate, their views have not been uniform despite the enviable degree of confidence with which they have sometimes been asserted. This fact and, in the absence of binding authority, the level of abstraction and generality involved in the academic exercise underlines the importance of the caution expressed by Megarry J. in *Cordell v. Second Clanfield Properties Ltd.,* [1969] 2 Ch. 9 (Ch. D.), at page 16:

> The process of authorship is entirely different from that of judicial decision. The author, no doubt, has the benefit of a broader and comprehensive survey of his chosen subject as a whole, together with a lengthy period of gestation, and intermittent opportunities for reconsideration. But he is exposed to the peril of yielding to preconceptions, and he lacks the advantage of that impact and sharpening of focus which the detailed facts of a particular case bring to the judge. Above all, he has to form his ideas without the aid of the purifying ordeal of skilled argument on the specific facts of a contested case.

[26] The words of the learned judge are even more appropriate in a case like this where, as in *Serhan*, the principles governing waiver of tort are relevant only for the limited purpose of determining, on a motion, whether the requirements of section 5 (1) - and, in particular, section 5 (1) (a) and 5 (1) (c) - of the CPA are satisfied.

[27] The requirement in section 5 (1) (a) must be considered in the light of the facts that have been pleaded and on the assumption that they will be proven at trial. Evidence is not admissible for this purpose and a finding that no cause of action has been pleaded is not to be made unless it is plain and obvious that this is so. It has, moreover, been held that novelty by itself will not justify such a finding and that a court should be slow to strike a plea on this ground in an area where the relevant law is developing or is otherwise unsettled. For the purposes of the inquiry into the existence and significance of common issues under section 5 (1) (c) evidence is admissible to a limited extent, but the task of the court is, essentially, to define issues that would be appropriately decided at a trial after all the evidence has been heard. Common issues are defined in section 1 of the CPA to include issues of law.

[28] There are two relevant issues relating to waiver of tort on which there appears to be no definitive authority that is binding on this court and on which the commentators are divided in their opinions. One is whether all the elements of an actionable tort must be proven - including a loss or injury; the other relates to the torts - or the tortious circumstances - in which the election between the remedies will be available.

[29] The first issue arose in *Serhan* in the context of section 5 (1) (c) for which purpose the defendants relied on evidence that, in their submission, established that the plaintiff had incurred no loss. The decision of the Divisional Court was that it was not clear that the claim for waiver of tort would fail without proof of loss, and that the issue should be tried. Moreover, although the pleading alleged, and specified, heads of damages suffered by the plaintiff, it is, I believe, implicit in the reasons of Epstein J. that, for the purposes of section 5 (1) (a) and a claim based on waiver of tort, it is unnecessary on the present state of the authorities to plead that a loss was incurred: *Serhan*, paras 52-69. On this point, see, also, *Strand Electric & Engineering Co. Ltd. v. Brisford Entertainment Co.*, [1952] 1 All E.R. 796 (C.A.), at page 253 and *Attorney - General v. Blake,* [2001] 1 A.C. 268, at page 279.

[30] The second issue was raised on the appeal in *Serhan* and, in the context of section 5 (1) (a), in the submissions of counsel for the defendants in this case. It is whether the election is permitted only in the case of certain torts - such as, for example, intentional torts or those that affect a plaintiff's proprietary interests - or whether it will be available, at least *prima facie*, whenever a defendant was enriched as a result of its tortious conduct.

[31] In considering the adequacy of the pleading of waiver of tort, I am no longer satisfied that it is helpful - or even meaningful - to ask simply whether the concept is, or is not, a cause of action. A question framed in this manner may obscure the essential nature of the inquiry under section 5 (1) (a) - namely whether the material facts that would, or could, entitle the plaintiffs to a disgorgement remedy have been pleaded. I believe it is likely to be even more confusing to ask whether waiver of tort is a cause of action or only a remedy. Different remedies – such as an equitable accounting or a constructive trust – may be available. To ask whether it is a cause of action also tends to confuse the issue with the more narrow question whether the availability of the remedy is dependent or "parasitic" on proof of all of the constituent elements of an actionable tort including, specifically, damages. This is the first of the issues I have referred to as not finally settled in the authorities. However, proof that an actionable tort was committed would not, in itself, satisfy the requirements of pleading waiver of tort. The cause of action in tort is not identical to the cause of action that must be disclosed for the purposes of section 5 (1) (a). The latter requires proof of a causal connection between the tort and the defendants' enrichment. The existence of this connection has been pleaded in this case.

[32] The plaintiffs have pleaded facts that sufficiently disclose a cause of action in negligence. In the submission of counsel for the defendants, the disgorgement remedy for waiver of tort is not available in respect of this tort. Negligence, they submit, is an "anti-harm", and not an "anti-enrichment" tort and only the latter can provide the basis for a remedy grounded in waiver of tort. In support of this distinction, they cited the decision of the British Columbia Supreme Court in *Reid v. Ford Motor Co.,* [2006] B.C.J. No. 993.

[33] In *Reid*, the question whether the existence of a cause of action for negligence could provide a basis for a disgorgement of benefits obtained by the plaintiff arose on a motion to amend the pleadings to insert a cause of action based on waiver of tort. The negligence pleaded consisted of the defendants' failure to warn of a dangerous defect in automobiles it had manufactured. The plaintiff sought to recover costs saved by the defendant by its failure to recall, and redesign parts of, the vehicles, and revenues it had obtained from selling replacement parts. As well as the claims for disgorgement, the amendments would have requested a declaration that the defendants had been unjustly enriched. Gerow J. dismissed the motion on the ground that it was plain and obvious that the amendments disclosed no reasonable cause of action. The learned judge held that the action did not fall within the types of cases where waiver of tort has been applied and that there was no principled basis on which to apply it on the particular facts. In so doing, she found that unjust enrichment was a pre-requisite, and that the three-pronged test established by decisions such as *Pettkus v. Becker*, [1980] 2 S.C.R. 834 must be satisfied before the remedy based on waiver of tort would be available. The learned judge also referred with apparent approval to the decision of Lowry J. in *Networth Industries Ltd v. Cape Flattery (The),* [1997] B.C.J. No. 3174 (B.C.S.C.), where, in addition to the reliance on

Pettkus, the learned judge had referred to the classification of torts into those that are anti-harm and anti-enrichment, respectively, and stated (at paras 24-5):

> However, to date, the torts on which claims for unjust enrichment have been grounded are, for the most part, proprietary torts – conversion, detinue, trespass to land and goods and deceit - described as "anti-enrichment wrongs" as opposed to what are said to be "anti-harm wrongs" – defamation, assault, battery, nuisance and negligence ...
> ... restitutionary claims are not made for nuisance and negligence because they are in the main anti-harm wrongs in relation to which it is impossible, even though they sometimes lead to an enrichment of the wrongdoer, to elevate the prevention of enrichment to the level of a primary purpose.

[34] In *Serhan*, the Divisional Court was provided with the reasons delivered in *Reid* after its decision had been reserved. In explaining why the court did not find it necessary to seek further submissions from counsel, Epstein J. stated (at para 66):

> There are several factors that make *Reid* distinguishable, not the least of which is that the claim is framed in negligence, unlike the case at bar where fraud and conspiracy form the foundation of the claim. Gerow J. recognised the significance of the fact that the matter before her was founded in negligence. At para 29 she said, "Restitutionary claims are not made in negligence and nuisance because they are in the main anti-harm wrongs in relation to which it is impossible, even if they lead to an enrichment of the wrongdoer, to elevate the prevention of enrichment to the level of a primary purpose." At para. 15, Gerow J. specifically identified fraud as one of the intentional torts where the doctrine of waiver of tort has been utilized.

[35] I do not consider the learned judge's comments to amount to an endorsement of the classification of torts that had been referred to in *Reid* and *Networth Industries.* Epstein J. did not have to consider whether or not the classification was sound as, in any event, it would not exclude the availability of the remedy in cases of fraud and conspiracy.

[36] As, in this case, negligence is the only tort relied on, the appropriateness of the classification, and the decisions in British Columbia, are much more directly in point. Despite the respect due to - and the persuasive authority of - the decisions, there are a number of reasons why I do not feel bound to follow the analysis of the learned judges and to find that it is plain and obvious that the plea based on waiver of tort is bound to fail.

[37] In the first place, I am not aware of any decisions that are binding on this court in which the three-pronged test for unjust enrichment has been held to apply to remedies based on waiver

of tort; *cf., Lewis v. Cantertrot Investments Ltd.*, [2006] O.J. No. 1061 (S.C.J.); *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2006] B.C.J. No. 1504 (B.C.S.C) (in which *Reid* was distinguished). Nor do I see why the test should necessarily be considered to be any more appropriate than, for example, where a person is held to account in equity for profits obtained through a breach of contract (as in *Attorney-General v. Blake*), or an equitable wrong consisting of a breach of a fiduciary duty of loyalty.

[38] In my opinion, it is not plain and obvious that a claim based on waiver of tort must satisfy the three-part test for unjust enrichment. Whether it must do so is a question that should be left to the trial. I will, however, consider the application of the test of the facts as pleaded when addressing the submissions of counsel on the paragraphs of the statement of claim that refer to unjust enrichment.

[39] I am also far from satisfied that, for the purposes of this motion, I should conclude that the proposed classification is sound. My principal difficulty is that it is by no means clear to me how one is to determine whether the primary purpose of a tort that has resulted in the enrichment of a defendant requires it to be placed within one category or the other. If circularity is to be avoided - and the terms "anti-enrichment" and "anti-harm" are not merely labels that indicate that a disgorgement remedy will, or will not, be available - there must be some good reason of principle or policy that will enable torts to be classified one way or the other.

[40] I regret that I do not find assistance in the decisions in the British Columbia Supreme Court on this question and, having reviewed the academic references cited in *Networth* that are available to me, I do not feel any further ahead.

[41] The principal proponent of the classification appears to have been the late Professor Peter Birks of Oxford University. His theory was propounded in his *Introduction to the Law of Restitution* (Oxford, 1985; revised, 1988) and was, I believe, based, among other things, on an assumption that the principles governing waiver of tort did not apply to certain torts that included nuisance and negligence. The classification of torts into those that are "anti-harm" and others that are "anti-enrichment" was an attempt to explain and rationalise this assumed limited application of the principles. The validity of the assumption is in issue in this case.

[42] I have not found guidance - in the contributions of Professor Birks that I have reviewed - on the nature of the inquiry that must be made to determine the appropriate category in which a particular tort should be placed. I note, also, that Birks was prepared to depart from his classification where a person's enrichment resulted from deliberate wrongdoing intended to achieve it.

[43] The classification proposed by Professor Birks has not been received with unqualified enthusiasm by other learned commentators. Andrew Burrows, in the *Law of Restitution* (Butterworths, 1993) - one of the other sources cited in *Networth* - described Birks' classification as "flawed in assuming that a clear division can be made between anti-enrichment and anti-harm wrongs" (at page 397). He notes, moreover, that it was subsequently abandoned by Professor Birks - in a work that is not available to me.

[44] The issue was discussed at some length in Goff and Jones, *The Law of Restitution* (6th edition), at pages 777 - 786 and in Maddaugh and McCamus, *The Law of Restitution* (looseleaf), para 24 - 300. Goff and Jones state (at pages 783 - 4):

> Some writers have sought to rationalise this body of common law in economic terms. Professor Palmer has suggested that it is necessary to determine whether the plaintiff's interest "is of a type for which it is normal to acquire a right of user by purchase", in other words, whether it has any market value. Professor Birks's explanation is somewhat similar: is the tort an "anti-enrichment" tort?; "was the prevention of the enrichment which the defendant had acquired a main purpose behind the wrong which he has committed?" At the same time he accepts that no wrongdoer should be allowed to retain a gain if he deliberately set out to enrich himself by committing the wrongful act - a significant exception to his principle of "anti-enrichment".
>
> Few common law courts have rationalised the law in these terms; and no English court has sought to weave any sophisticated golden thread to unite the cases on "waiver of tort". In *Hambly v. Trott*, Lord Mansfield was content to contrast the position of the tortfeasor who "acquires no gain" with that of the tortfeasor who acquires property which benefits him. English courts should adopt a similar principle, at least if the tortfeasor was an intentional tortfeasor; namely, if it can be demonstrated that a tortfeasor has gained a benefit and that benefit would not have been gained but for the tort, he should be required to make restitution. If adopted, it may be possible for the injured party to recover the benefit gained by a defendant from tortious acts which have not hitherto formed the basis of a restitutionary claim; for example, nuisance or defamation.

[45] Maddaugh and McCamus go further and express the opinion that the doctrine of waiver of tort should "in theory at least extend to any case where tortious conduct has produced a profit" (page 24 - 9, September 2005). Similar views are advanced in Edelman, *Gain-Based Damages* (Oxford, 2002), where the Birks' classification is rejected (at pages 130-1) and it is suggested that the remedy should be available, at least, in cases of "cynical" tortfeasors where compensatory damages are inadequate to deter wrongdoing (page 148). The author supports the analysis that treats remedies available for waiver of tort to be only one variety of disgorgement remedies for gains-based wrongs – an analysis that can be obscured by the traditional application of different labels to what he suggests are essentially the same remedies.

[46] None of these learned authors purports to rest his opinions on authoritative judicial statements of an appropriate classification. They have been engaged in the process of

rationalisation of decisions in the light of unifying characteristics that, until relatively recently, went largely unacknowledged by courts and by the profession at large. With the gradual but increasing recognition of general restitutionary principles by the courts there is inevitably a measure of uncertainty with respect to the existing law and the manner in which it is likely to develop in the future. What does appear to be certain is that, as the unifying principles are accepted, some of the limitations that the older cases may have appeared to place on the availability of restitutionary remedies will disappear. An approach that would consider waiver of tort as necessarily restricted to the specific wrongs for which a disgorgement remedy has been granted in the past would be inconsistent with the prevailing approach of the Supreme Court of Canada to the development of the law governing restitutionary remedies in cases such as *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at pages 788-789, and *Garland v. Consumers Gas Co.*, [2004] 1 S.C.R. 629, at para 47.

[47] On the basis of the facts pleaded in this case, it would be open to a trial judge to find (a) that the defendants breached a duty of care by deliberately concealing, or withholding, information about harmful side-effects of Zyprexa for the purpose of gaining the approval of Health Canada, (b) that they intended to, and did, profit thereby and (c) that, but for the breach of duty, such profits would not have been obtained. In connection with the third of these possible findings, I note that it is explicit in the pleading that none of the primary plaintiffs would have taken the drug if they had been informed of its alleged side-effects. In this sense, the enrichment was caused by the defendants' wrongdoing and, in these circumstances, I am not prepared to conclude that the plaintiff's claim to a disgorgement remedy based on waiver of tort is bound to fail. Nor do I believe that it is sufficiently clear that a deliberate breach of a duty of care must be regarded as a precondition for such a remedy.

[48] As was recognised at first instance, and in the Divisional Court, in *Serhan* there may well be important issues of policy to be considered when drawing the line between cases where a disgorgement remedy should be granted and those in which it should be denied. These are questions that must surely be confronted on the basis of a full factual record, and not on a procedural motion such as this. As Epstein J. stated in *Serhan* (at para 68):

> ... the resolution of the questions the defendants raised about the consequences of identifying waiver of tort as an independent cause of action in circumstances such as exist here, involves matters of policy that should not be determined at the pleading stage.

[49] Finally, I note that, whereas it has been frequently emphasised in cases in this jurisdiction that in situations where the law is unsettled, or in a state of development, the court should be slow to deal with unresolved legal issues simply on the basis of the pleadings, a less restrictive approach to the plain and obvious test may be accepted in British Columbia: see, for example, *Pearson v. Boliden*, [2002] B.C.J. 2593 (B.C.C.A.), para 39.

Unjust enrichment

[50] Paragraphs 41 and 42 of the statement of claim contain allegations that are intended to support a claim for unjust enrichment. They read as follows:

> 41. The plaintiffs and the plaintiff class have suffered a detriment as set out in paragraphs 37 - 39 and the defendants have obtained a benefit without juristic reason.
>
> 42. The plaintiff[s] and plaintiff class plead that the defendants have been unjustly enriched as a result of the revenues generated as a result of the sale of Zyprexa.

[51] In paragraphs 37 - 39, it is pleaded that the plaintiffs have suffered expenses and damages for personal injuries, pain and suffering, loss of income and benefits and other losses as a result of the defendants' negligence. Such injuries and losses are also those for which compensatory damages for the tort of negligence are claimed.

[52] It is now well established in Canadian law that in order to plead, and to establish, a cause of action for unjust enrichment the tripartite test in *Pettkus* must be satisfied: there must have been in an enrichment of the defendant, a corresponding deprivation of the plaintiff and the absence of a juristic reason for the enrichment.

[53] At the hearing of the motion, counsel for the plaintiffs were ambivalent on whether the plea of unjust enrichment was intended to assert a cause of action separate and distinct from that based on waiver of tort, or whether it was intended to underpin or buttress the latter. My understanding was that they wished to be able to rely on each of these possibilities, in the alternative, at the trial.

[54] The question of the correct characterization of the plea raises another fundamental issue on which the commentators are divided. This is whether the principle of unjust enrichment applies, or should apply, to all cases in which "restitutionary" remedies - including, for this purpose, wrongs-based disgorgement remedies - are available, or whether it should be limited, as the word "restitution" suggests, to situations where a transfer of money or money's worth from the plaintiff to the defendant has occurred either directly or by subtraction. The wider view would treat all such remedies under the rubric of unjust enrichment - and, in consequence, they would be subject to the tripartite test. If that view is accepted, the plea of unjust enrichment supports, and is part of, the claim based on waiver of tort in the paragraph 43 of the statement of claim, and does not assert a separate cause of action. On the narrower view, two different cause of action have been pleaded.

[55] The wider view appears to have the support of Professors Maddaugh and McCamus in chapter 3 of their treatise. The alternative, more narrow, view was strongly articulated by Professor Birks in a number of books and articles, including the second edition of his work, *Unjust Enrichment,* (Oxford, 2005) that was published posthumously. It also has the support of Professor Lionel Smith in his article, *The Province of the Law of Restitution* (1992), 71 Can.

Bar Rev. 672. On this approach, the question of unjust enrichment and the tripartite test are irrelevant to wrongs-based disgorgement remedies such as waiver of tort.

[56] The difference between the two concepts of unjust enrichment is, I think, reflected in the contrasting approaches of the majority, and the minority, judges in *Soulos v. Korkontzilas,* [1997] 2 S.C.R. 217. The majority held that, although there was no unjust enrichment, a remedial constructive trust should have been recognized at trial. The minority considered unjust enrichment to be a precondition to the availability of the remedy. Maddaugh and McCamus believe a finding of unjust enrichment could have been made on the facts of the case - a view that is inconsistent with those of both the majority and the minority judges.

[57] In order to reconcile their wider concept of unjust enrichment with their concern that the tripartite test should supplement, and not supplant, the rules that had been developed with respect to restitutionary remedies long before the emergence of the test, Maddaugh and McCamus have had to place a similarly broad construction on the concept of a "corresponding deprivation", and, (in para 3.200.40 as of September 2005) they are troubled by the approach in *Garland* to the requirement that there be no juristic reason for a defendants' enrichment.

[58] In the view of the learned authors, there will be a corresponding deprivation whenever the defendants' enrichment was obtained at the expense of the plaintiff, and the situations in which this will occur may include any case where the enrichment was acquired by the defendant through, and only because of, a breach of duty owed to the plaintiff. On the narrower view, there will be a deprivation only where there has been a transfer, or subtraction, of wealth from the plaintiff.

[59] On the basis of the wider theory of unjust enrichment, the requirement of a corresponding deprivation would, I believe, be satisfied in this case. The position would be otherwise if the narrower approach is adopted. The fact that a plaintiff has suffered damages, or a detriment, should not by itself be sufficient. The loss must correspond to the enrichment in the sense that the latter was, in a general sense, derived from, or linked to, a loss suffered by the plaintiff. There would need to be a transfer, or subtraction, of money or money's worth from the plaintiff to the defendant. As McLachlin C.J. stated in *Peel*, at para 41:

> Thus, for recovery to lie, something must have been given, whether goods, services or money. The thing which is given must have been received and retained by the defendant.

[60] I do not believe the detriment – the damages – on which the plaintiffs rely would be a corresponding deprivation in this sense. It was, I understand, for this reason that it was held in *Reid* that such a deprivation had not been pleaded. I note that, although it is pleaded that Daniel Wells will incur expenses for medication required as a result of his present diabetic condition, there is no express allegation that the cost of obtaining Zyprexa was borne by him, or by any of the class members.

[61] The point is made very clearly by Professor Lionel Smith in the article [(1992), 71 Can. Bar Rev. 672] I have cited. At page 684, when distinguishing wrongs-based claims for restitution from claims for unjust enrichment, he stated:

> [A gain-based response for wrongs] does not require the proof of the cause of action in unjust enrichment, because by hypothesis the plaintiff has proved some other cause of action. Second, it is not about the reversal of a past transfer of wealth from the plaintiff to the defendants; rather, it is about the appropriation to the plaintiff of wealth which the defendant received from some other source. In restitution for wrongs, there is no requirement that the plaintiff have suffered a loss. The point of restitution for wrongs is solely to take away the defendants' gain, which in all likelihood came not from the plaintiff but from others. The plaintiff's connection to the defendants' gain is not that the gain came from the plaintiff; in the language of the second element of the cause of action in unjust enrichment, there need not have been a "corresponding deprivation".

[62] Similarly, when summarising the effect of *Pettkus*, the learned editors of *Waters' Law of Trusts in Canada* (third ed., 2005), at page 466 state:

> The first two elements of the cause of action - an enrichment of the defendant and a corresponding deprivation of the plaintiff - capture the requirement of a transfer of wealth, defined broadly to include goods and services but viewed "economically", not through a lens of policy.

[63] On the basis of the narrower theory of unjust enrichment with this similarly narrow concept of a corresponding deprivation, I do not believe that the test in *Pettkus* would be satisfied. The result would be that the pleading would disclose no separate cause of action for unjust enrichment, but that this would not affect the claim based on waiver of tort. If, on the other hand, the approach endorsed by Maddaugh and McCamus is correct, the only cause of action would be that based on waiver of tort and, although the *Pettkus* test should be applied to it, the requirement of a corresponding deprivation would be satisfied. It follows that, irrespective of the theory of unjust enrichment that is accepted, the outcome of the case should not be affected unless the wider theory endorsed by Maddaugh and McCamus is - contrary to the views of the learned authors - coupled with the narrower concept of a corresponding deprivation.

[64] I believe it is clear that the above unresolved questions of theory and principle are not at all appropriate for decision on the basis of the pleading and in the context of a motion for certification of the proceeding where the role of the court is, essentially, to determine whether there are common issues of law or fact that should be tried. However, whichever of the two theories is correct, I am of the opinion that the statement of claim does not disclose a separate

cause of action for unjust enrichment and so find. The contrary can only be correct if the narrower theory was coupled with the wider concept of a corresponding deprivation and I do not believe the two are compatible: see Birks, *Unjust Enrichment* (second edition, 2005), at page 74 and *passim.*

[65] For the above reasons, I find that the requirement in section 5 (1) (a) is satisfied with respect to the causes of action in negligence and the claim for a remedy based on waiver of tort – but not for a cause of action for unjust enrichment distinct from that based on waiver of tort.

2. Section 5 (1) (b) - an identifiable class

[66] The class, as proposed by the plaintiffs is as follows:

> (a) all persons resident in Canada (excluding British Columbia and Quebec) who were prescribed and ingested the drug Zyprexa (generic name: olanzapine), which was manufactured, marketed, and/or sold or otherwise placed into the stream of commerce in Canada by Eli Lilly & Company and/or Eli Lilly Canada Inc.; and
>
> (b) all persons resident in Canada who by virtue of a personal relationship to one or more of the persons described in (a) above, have a Family Law Act (or equivalent in other provinces or territories) derivative claim for damages.

[67] In the submission of Defendants' counsel, the primary class is over-inclusive, incurably diverse and lacking in commonality.

[68] The first of these criticisms is based, in part, on evidence that only a small fraction of the number of individuals who ingested Zyprexa will have developed diabetes, or one of the related complaints. Counsel submitted that all other members of the class - including persons who suffered from such illnesses prior to taking the drug - will have no claim against the defendants and that "an overly-broad class is one that includes members who have no claim". In my opinion this submission is itself overly-broad and is not supported by the authorities - *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158, at para 21 and *Cloud v. Canada (Attorney-General)* (2004), 73 O.R. (3d) 401, at para 45 - cited by defendants' counsel. It is also inconsistent with the reasons of Nordheimer J. in *Gariepy v. Shell Oil Co.* (2002), 23 C.P.C. (5th) 360, para 39 to which counsel for the plaintiffs referred.

[69] I rejected a similar submission in *Ragoonanan v. Imperial Tobacco Inc.* (2005), 78 O.R. (3d) 98 (S.C.J.). I will not repeat what I said in that case except to emphasise that:

(1) whenever, because of the existence of individual issues, a judgment on the common issues in favour of the plaintiffs will not determine a defendant's liability, it will always be possible - and invariably likely - that an acceptable class will include persons who will not have valid claims; and

(2) in the passage from the reasons of the Chief Justice in *Hollick* - a passage summarized in *Cloud* (para 45) - what was stated was that the class must not be "unnecessarily" broad in the sense that it

> ... could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues. 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 ...

In *Ragoonanan* I commented (at para 12):

> ... it seems to me that the Chief Justice was recognising that an "over-inclusive" class ... is permitted if a more narrow definition would arbitrarily exclude persons whose claims the plaintiff wishes to enforce.

[70] I adhere to that view. Applying it to the circumstances of this case I do not believe the proposed class is over-inclusive. While, in order to establish liability for negligence, each class member will have to prove that a loss was suffered, the question whether this is necessary when waiver of tort is pleaded is one on which the learned commentators are divided. In the context of section 5 (1) (a) I have referred to the views of Professor Lionel Smith in his article in the Canadian Bar review in which he repeatedly emphasised that proof of loss is unnecessary for wrong-based disgorgement remedies. In *Waters' Law of Trusts in Canada* the same view is endorsed by his co-editors at page 468 where it is stated:

> When a plaintiff is seeking to take away a defendant's wrongful gain, the question whether there was any loss to the plaintiff is completely irrelevant.

[71] The uncertainty on the point was recognized at first instance and on appeal in *Serhan* and, as I have already mentioned, it was left to be tried as part of the common issues in that case. I intend to do likewise rather than to require that the class be limited to those who developed diabetes or a related illness after ingesting Zyprexa.

[72] The evidence suggests that Zyprexa was first marketed in Canada after the defendants received the approval of Health Canada in 1996. Although it is alleged in paragraph 40 of the statement of claim that the defendants may have first become aware of the alleged side-effects only in November 2001, and that they concealed them from 2001 through 2004, the claim for negligence is not limited to the period after November, 2001. It is pleaded in paragraph 19 (a) of the statement of claim that "the defendants failed to conduct adequate tests and clinical trials initially as well as on an ongoing basis" and, in paragraph 21, it is alleged that the injuries of the plaintiffs were caused by "negligence of Eli Lilly in failing to ensure that Zyprexa was safe for

use". In consequence, I do not accept the further submission of defendants' counsel that, the allegations with respect to the defendants' knowledge, and concealment, of the risks after November 2001, entail that those who ingested the drug before that time will have no valid claim in negligence and must be excluded from the class. In the event - which I consider to be possible – that a trial judge found that a remedy for waiver of tort should be limited to a period in which the defendants deliberately concealed risks of which they were aware, this could be dealt with by carving out a subclass of persons who took the drug in that period.

[73] Defendants' counsel submitted also that the class, as defined, was objectionable as, in the absence of temporal restrictions, it would remain open indefinitely. I accept that, as drafted, it is over-inclusive in this respect unless, as I would be inclined to do, the primary class is understood to refer only to those who had ingested Zyprexa before the commencement of the action on February 2, 2005. Alternatively, as plaintiff's counsel submitted at the hearing, the class definition could be amended so that the primary class would close on the date of any order certifying the proceeding. Either approach would be acceptable.

[74] The defendants' criticism in respect of the diversity of the circumstances, and the manner, in which class members will have ingested Zyprexa and the "lack of commonality among the class" are best considered together with the inquiries into the existence of common issues proposed by the plaintiffs and into the preferable procedure.

[75] If the derivative claims of persons within the secondary class are intended to be limited to valid claims, the description of that class obviously begs the merits of the issues that will determine whether the claims will be sustained. If, however, the description is intended - or is amended - to refer to those who would have standing to assert derivative claims under the relevant legislation if the defendants' liability to members of the primary class is established, I do not consider that it is, or would be, objectionable. Similar descriptions have been accepted in numerous cases that have been certified.

[76] Finally, in the context of the class definition, I should mention defendants' counsel's objection to the uncertainty in the reference, in the definition of the secondary class, to persons who have a derivative claim for damages equivalent to a FLA claim in Ontario. They queried also the status of claims that plaintiffs' counsel indicated were intended to be made on behalf of the authority in Alberta that pays, or reimburses, patients for prescription drugs and medical expenses. Uncertainty on the first point arises because - I was informed - only Alberta has statutory provisions that are closely comparable to those of section 61 of the *Family Law Act* and the only analogous provisions in the other provinces and territories are to be found in their fatal accidents legislation. The other uncertainty exists because, as I have indicated above, while health insurers in Ontario and elsewhere in Canada other than Alberta, have subrogated claims, my understanding is that legislation in Alberta provides the relevant authority with a direct action. Each of these points will need to be clarified before any final order certifying the proceedings is made.

3. Section 5 (1) (c) - common issues

[77] The plaintiffs propose the following as common issues to be tried after the proceedings have been certified:

> 1. Can Zyprexa cause diabetes and/or other metabolic disturbances as well as secondary injuries flowing therefrom?
>
> 2. Is Zyprexa defective or unfit for the purpose for which it was intended as designed, developed, fabricated, manufactured, sold, imported, distributed, marketed or otherwise placed into the stream of commerce in Canada by one or both of the defendants?
>
> 3. Did the defendants knowingly, recklessly or negligently breach a duty to warn or materially misrepresent any of the risks of harm from Zyprexa?
>
> 4. Are class members entitled to special damages for medical costs incurred in the screening, diagnosis and treatment of diseases related to Zyprexa?
>
> 5. Should the defendants be required to implement a medical monitoring regime and, if so, what should that regime comprise and how should it be established?
>
> 6. Can the past and future damages of the provincial health insurers be determined on an aggregate basis?
>
> 7. Should the defendants pay exemplary or punitive damages?
>
> 8. Are the defendants constructive trustees for all or any class members of all or any part of the proceeds of the sales of Zyprexa and if so, in what amount, and for whom are such proceeds held?
>
> 9. Are the defendants liable to account, by waiver of tort, to any of the class members on a restitutionary basis for any part of the proceeds of the sales of Zyprexa? If so, in what amount and for whose benefit is such accounting to be made?

[78] In the submission of their counsel, (a) each of these issues is necessary to, and a substantial ingredient of, each class member's claim ("commonality"); (b) the necessary factual basis for each of the proposed issues has been established by evidence filed in the motion; and (c) the resolution of the issues would avoid duplication of fact-finding or legal analysis and would advance the litigation sufficiently to justify certification.

[79] As authority for their submission that it followed that the requirements of section 5 (1) (c) are satisfied, counsel relied on numerous well-known authorities including *Western Canadian Shopping Centres v. Dutton,* [2001] 2 S.C.R. 534; *Ford v Hoffmann-La Roche Ltd* (2005), 74 O.R. (3d) 758 (S.C.J.); *Rumley v. British Columbia*, [2001 3 S.C.R. 184; *Carom v. Bre-X Minerals Ltd* (2000), 51 O.R. (3d) 236 (C.A.); *Cloud*; and *Gariepy v. Shell Oil Company*, [2002] O.J. No. 2766 (S.C.J.). Counsel for the defendants did not dispute the correctness of the plaintiffs' understanding of the requirements established for the purposes of section 5 (1) (c) by these authorities. In their submission, however, the court should find that none of them is satisfied on the basis of the pleadings and the evidence in the record.

[80] As formulated, the proposed common issues are similar to those accepted by Cumming J. in *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.) for the purpose of certifying an action against the manufacturer and distributor of a weight-loss drug that allegedly had harmful side-effects. As in this case, the plaintiffs in *Wilson* claimed damages for negligence, and restitutionary remedies. In the submission of counsel for the defendants, the evidence here reveals significant differences between the facts in the two cases not only on the merits of the action - a matter with which I am not concerned - but also in respect of the requirements for certification.

[81] I will consider the question of commonality and the existence of the required evidential basis in respect of each of the proposed common issues. The extent to which the issues that, in my judgment, satisfy these requirements will advance the proceeding will be addressed in the light of the inquiry into the preferable procedure that is mandated by section 5 (1) (d).

Common issue # 1: Can Zyprexa cause diabetes and/or other metabolic disturbances as well as secondary injuries flowing therefrom?

[82] The word "other" should, I believe, be replaced with "related" to conform with the pleading but otherwise this issue is acceptable. Its existence as an issue is amply supported by the conflicting expert evidence in the record. In effect, it asks whether the use of Zyprexa carries with it a risk of harmful side-effects of specific kinds. The question is fundamental to the claims of all the class members. The existence and nature of any such consequences can be identified at trial largely on the basis of expert evidence. As MacInnes J. stated in *Walls v. Bayer Inc.*, [2005] M.J. No.4 (Man Q.B.) (at para 51):

> A factual enquiry as to the nature of the problems caused by an allegedly defective drug is an appropriate common issue ... This issue is one which can be determined at a common issues hearing and which will turn essentially on the evidence of expert witnesses. It will not require the evidence of plaintiffs or members of the class. As well, a determination of this issue will advance the litigation.

[83] The question whether the class members experienced such consequences will have to be determined individually but this does not detract from the commonality of the issues

formulated. The significance of the individual issues in relation to the common issues is most appropriately determined after all the issues on which the defendants' liability will depend have been identified and placed in one category or the other.

Common issue # 2: Is Zyprexa ineffective or unfit for the purpose for which it was intended as designed, developed, fabricated, manufactured, sold, imported, distributed, marketed or otherwise placed into the stream of commerce in Canada by one or both of the defendants?

[84] The formulation of this issue was criticized by defendants' counsel as incorporating the language and concepts found in section 15 of the *Sale of Goods Act* R.S.O. 1990, c. S.1 - a statute that is not relied on by the plaintiffs. I do not find this to be a compelling objection. The plaintiffs have pleaded not merely that the defendants were negligent in failing to warn class members of the risk of harmful side-effects, but also of the existence, and breach, of a duty of care to ensure that Zyprexa was fit for its intended, or reasonably foreseeable use. Proposed common issue # 2 is directed at this question and I do not believe the adoption of the language of the *Sale of Goods Act* is objectionable.

[85] The issue, like the first, is substantially identical to one that was accepted by Cumming J. in *Wilson,* and has some similarity to those certified in cases such as *Harrington v. Dow Corning Corp,* [2000] B.C.J. 2237 (B.C.C.A.); *Walls*; and *Wheadon v. Bayer Inc.,* [2004] N.J. No. 147 (NLSCTD), affd., [2005] N.J. No. 122 (C.A.).

[86] The focus of the issue might be sharpened by tying it to an affirmative answer to common issue # 1 and inserting "thereby" after the reference to Zyprexa. I believe it needs also to be supplemented by an issue directed at whether, by marketing and distributing the drug in Canada, the defendants breached a duty of care owed to the class.

[87] I understand the reference to the intended purpose for which Zyprexa was designed etc., and distributed to include usages that ought reasonably have been foreseen by the defendants.

Common issue # 3: Did the defendants knowingly, recklessly or negligently breach a duty to warn or materially misrepresent any of the risks of harm from Zyprexa?

[88] A common issue in substantially this form was, again, accepted in *Wilson*. As counsel for the defendants submitted, the issue, as formulated, contains two separate subissues: (a) whether the defendants knowingly, recklessly or negligently breached a duty to warn; and (b) whether they knowingly, recklessly or negligently materially misrepresented risks of harm from Zyprexa.

[89] In my opinion, the first of these issues has the required attribute of commonality. It is very much in dispute in the litigation. The objection of defendants' counsel, that the plaintiffs have failed to plead facts to support a claim that the defendants' breach of a duty to warn was made with knowledge of the risks associated with Zyprexa, ignores the stipulation in rule 25.06

(8) that "knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred".

[90] A second objection that the first issue fails to take into account the evolution of representations made by the defendants during the class period is not, in my judgment, fatal. The position of the plaintiffs – supported by the evidence of Dr Chue - is that none of the representations adequately warned class members of the risks of which they had knowledge, or reasonably ought to have been aware. If a court at trial found that later, but not earlier, warnings were adequate, a nuanced response such as that referred to by McLachlin C.J. in *Rumley*, at para 32, would be possible.

[91] For essentially the same reason I do not consider defendants' counsel's similar objections to the second issue included in common issue # 3 to be well-founded. The significance of the reference to negligent misrepresentations may not, however, be immediately apparent. Although such representations are referred to in the pleading, the other necessary elements of a cause of action for negligent misrepresentation have not been pleaded, and I do not believe such a separate cause of action has been disclosed. Nor, on the basis of the factum of plaintiffs' counsel, and their submissions at the hearing, do I understand that they intended to assert the contrary. A finding that negligent misrepresentations were made could, however, have some possible bearing on the claim for punitive damages and that relating to waiver of tort, as well as, to some extent, on the question whether there was a breach of a duty to warn. In consequence, I am of the opinion that proposed common issue # 3 is acceptable.

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

[92] The formulation of common issues # 4 and # 5 appears also to be modelled on those accepted in *Wilson*. To the extent that # 4 presupposes that findings of liability have been made, it raises questions that could not be answered comprehensively, and finally, until the individual issues of causation and damages have been determined. It would, however, require a judicial determination at some stage and, if common issues #s 1, 2 and 3 are answered affirmatively, the court, at a common issues trial, may be able to decide # 4 conditionally for - and limited to - those members of the class who are subsequently able to establish valid claims. The quantum of any such damages would, of course, also have to be deferred. I am not satisfied at this stage of the proceedings that it will not be possible, and appropriate, for such a conditional finding to be made at a common issues trial. The question whether this should appropriately, and usefully, be done should, I believe, be left to the trial judge. Accordingly, I would accept common issue # 4.

Common issue # 5: Should the defendants be required to implement a medical monitoring regime and, if so, what should that regime comprise and how should it be established?

[93] I see no reason why this issue, as formulated, could not be addressed at a common issues trial on the basis of expert evidence, and the findings made on the preceding common issues. A decision on whether the court could properly order monitoring for persons who have not yet suffered damages would appear to be required. A negative answer to this question would not

exclude the possibility that a monitoring regime for other class members should be established. The defendants' objection that additional monitoring would not be required relates to the merits of the issue, rather than to the question of commonality.

Common issue # 6: Can the past and future damages of the private health insurers be determined on aggregate basis?

[94] I am satisfied that it is not possible for an aggregate determination of the compensatory damages of provincial health insurers to be made at a common issues trial. Pursuant to section 24 (1) (b) and (c) of the CPA, this would be permitted only where

> ...(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the Defendants' monetary liability; and
>
> (c) the aggregate or a part of the Defendants' liability to some or all class members can reasonably be determined without proof by individual class members.

[95] I accept the submission of defendants' counsel that neither of these requirements can be satisfied in the case of the insurers before the individual issues that would determine whether the defendants are liable to pay compensatory damages to class members have been decided. In the words of Winkler J. in *Bywater v. Toronto Transit Commission,* [1998] O.J. No. 4193 (G.D.) (at para 18):

> In my view, the case at bar is not appropriate for an aggregate assessment of damages. The action advances claims for personal injury, ... and claims under the *Family Law Act.* These claims cannot, "reasonably be determined without proof by individual class members" as required by S. 24 (1) (c). Furthermore, each individual claim will require proof of the essential element of causation, which, in the words of 24 (1) (b), is "a question of fact other than those relating to an assessment of damages".

[96] I will refer below to the possibility that the subrogated claims of insurers might extend to amounts recoverable through disgorgement remedies.

Common issue # 7: Should the defendants pay exemplary or punitive damages?

[97] Claims for punitive damages have been included in orders certifying class proceedings in a number of cases. In *Rumley*, McLachlin C.J. accepted that, although this would not be possible in all cases, it was appropriate where, for the purpose of determining issues relating to a breach of a duty of care and fiduciary duties, the focus would be on the knowledge and conduct of the defendants. In para 34, she stated:

> This is exactly the kind of fact-finding that will be necessary to determine whether punitive damages are justified ...

[98] I believe that reasoning is equally applicable to the claims, and the facts pleaded, in this case and that common issue # 7 should be included in any order certifying the proceedings. I note, also, that in *Rumley,* the Chief Justice contemplated the possibility that the quantum of - as well as the liability to pay - punitive damages might properly be determined at the trial of common issues. The possibility that, because of the requirement that compensatory damages have been found to be inadequate, the inquiry might be bifurcated between a preliminary consideration by the trial judge of the defendants' conduct and a subsequent final determination of the liability for, and the quantum of, punitive damages after the individual issues had been decided was accepted by the British Columbia Court of Appeal in *Fakhri v. Alfalfas Construction Inc.,* [2004] B.C.J. No. 2200.

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

[99] The possibility that a constructive trust might be imposed on the basis of unjust enrichment is excluded by my finding that no such cause of action has been disclosed in the pleading. The possibility that, as a proprietary remedy, a constructive trust might, but would not necessarily, be appropriate as a remedy for waiver of tort on the facts of *Serhan* was recognized at first instance, and in the Divisional Court where the question - and the availability of an alternative remedy for an accounting - were examined by Epstein J. at some length: *Serhan*, paras 77-124. It was held that the question should not be resolved without a complete factual record. Accordingly, if common issue # 9 is acceptable, a reference to a constructive trust as an alternative remedy could be included. If that is done, common issue # 8 would be redundant.

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

[100] As it has been formulated, common issue # 9 contemplates a personal remedy of an accounting in the broad sense of a quantification and order to pay; see Birks, *Unjust Enrichment* (2nd edition, 2005), at pages 293 - 295. In this sense, I do not believe it is any different from the concept of "restitution damages" referred to by Major J. in *Bank of America Canada v. Mutual Trust Co,* [2002] 2 S.C.R. 601, at paras 30-1; *cf.*, *Attorney-General v. Blake*; Doyle & Wright, *Restitutionary Damages - the Unnecessary Remedy*, (2001) University of Melb. Law Review 1 (where it is argued that the terminology and principles governing the equitable remedy of an accounting should be applied).

[101] The finding that a cause of action based on waiver of tort has been disclosed in the pleading is not in itself sufficient to qualify it as a common issue. In particular, the court must be satisfied that it is possible to determine on a class-wide basis whether a sufficient causal connection existed between the wrongful conduct and the amount for which the defendants could be ordered to account. In *Serhan*, the "but for" test of causation would have been satisfied if a

finding was made that the products involved were, as pleaded and supported evidentially, dangerously defective to the knowledge of the defendants. Similarly, in this case, a necessary causal link between the wrong and the amount claimed by way of "restitution" or disgorgement would be established if the plaintiffs can prove their claim that the defendants were negligent in placing Zyprexa on the market, or in continuing to market it after November, 2001, without a sufficient warning of its side-effects. In the event of a finding to this effect, the defendants would not have derived any proceeds but for their breach of duty and, in this sense, the proceeds would have resulted from the wrong. In consequence, I believe the question of causation could - as in *Serhan* - be dealt with in respect of the class as a whole. On this basis, and in view of my findings with respect to the present state of the law governing waiver of tort - and in particular the uncertainty relating to its application to the tort of negligence, as well as on the question whether proof of loss is required - I will include common issue # 9 in any certification order. I would also expand the issue to include the provincial insurers who have subrogated claims.

[102] I note that, depending on the method of computation approved by the trial judge, a final decision on the amount of any liability to account might have to be deferred until individual issues have been decided or, at least, until the size of the class, or the number of claimants, has been determined.

4. Section 5 (1) (d) - the preferable procedure

[103] It was held in *Hollick* (at para 29) that the application of the requirement that a class action would be the preferable procedure for resolving the common issues requires the court to consider not just the common issues but, rather, the claims of the class in their entirety. This involves a consideration of the extent to which the proceedings will be advanced by a resolution of the common issues as well as the question whether - and to what extent - a class proceeding would advance the objectives of the legislation: access to justice; judicial economy; and behavioural modification.

[104] The requirement in section 5 (1) (d) will not be satisfied if the common issues are overwhelmed by the individual issues that remain so that the resolution of the former will, in substance, mark just the commencement of the process leading to a final disposition of the claims of class members. A further requirement, which is also implicit in the reference to a workable litigation plan in section 5 (1) (e), is that the plaintiffs must satisfy the court that the proceedings will be manageable. This is particularly important when the class is large and some of the individual issues are likely to be contentious, and unlikely to be resolved without formal, expensive and protracted hearings.

[105] Counsel for the defendants submitted that the plaintiffs have not discharged the burden of demonstrating that this action satisfies any of the above tests. For the main part, their submissions focused on the difficulty of determining, in the case of each class member, whether Zyprexa had caused the diabetes, or related complaints referred to in the statement of claim, and whether, in the light of the drug's efficacy for various purposes, the risks would have been accepted by the member if full disclosure had been made. For these purposes, counsel emphasised the number and complexity of factual issues, relating, for example, to other possible causal factors - including the predisposition of class members to suffer from such complaints because of the

various diverse illnesses for which Zyprexa was prescribed - the medical history of each member and his or her family, and the information, advice and treatment members had received from their attending physicians.

[106] All of these objections may be beside the point if the restitutionary remedy based on waiver of tort was accepted at a trial of the common issues, and the plaintiff elected to accept that remedy instead of compensatory damages for negligence. As that would move the proceedings a long way towards their conclusion - and as the only alternative suggested by counsel for the defendants would consist of individual actions by the class members - there is no doubt that the objectives of the CPA would be advanced, and the other requirements and tests under section 5 (1) (d) would be satisfied.

[107] I would reach the same conclusion if the claim based on waiver of tort had not been pleaded and, in consequence, I would not exclude the claims for damages for negligence, and the common issues relating to them, from an order certifying the proceedings.

[108] In connection with their submissions on the manageability and complexity of the individual issues that would be involved in resolving such claims, defendants' counsel placed weight on the size of the class which they estimated to be approximately 575,000 to the end of 2005. However, in the opinion of one of the experts whose affidavits they filed, and had relied upon for other purposes, only a small fraction of persons who ingested Zyprexa would, regardless of the cause, have developed diabetes or one of the related complaints.

[109] In *Wilson* - where it was estimated that there might be 155,000 members of the class - the proceeding was certified notwithstanding the existence of numerous individual issues that were similar to those that may arise in this case. Leave to appeal to the Divisional Court from the decision of Cumming J. was denied by Lang J. who stated that there was no reason to doubt the correctness of the decision that a class proceeding would be the preferable procedure: [2000] O.J. No. 4735 (S.C.J.), at para 15.

[110] The learned judge had declined to accept a submission that a class action was not the preferable procedure because of the number and variety of the individual issues relating to the medical conditions of class members, the causes of their medical problems, the nature of the medical advice and treatment they received, and the damages they suffered. He accepted that a large number of these issues could well arise for each class member who claimed that his disease resulted from the consumption of the drugs in question. He recognized that individual discoveries, and mini-trials, would probably be required to resolve the claims of these members. He was satisfied that a resolution of the significant common issues would advance the progress of the litigation, and he was not prepared to find that a class proceeding would be unmanageable. In his judgment, the three primary policy objectives of the CPA - access to justice, judicial economy and behavioural modification - would be furthered by certification. He stated (at paras 124 - 126):

> Access to justice is extended to persons who may have been injured by a defective product. There would be very significant cost to any claimant pursuing an individual claim given the

> tremendous complexities of evidence and issues, the extensive scientific and medical evidence and discoveries and the protracted nature of the litigation: ... But for a class proceeding, the defendants (if responsible) would in all probability be effectively isolated from the individual claims.
>
> Judicial economy and efficiency will be achieved if the common issues are resolved in a single proceeding. It is only by spreading and sharing the cost through the scale efficiencies of a class action that members will have an opportunity to resolve their claims. Moreover, by resolving common issues for a single proceeding, the danger of producing inconsistent results through a multiplicity of trials is avoided ...
>
> Finally, the policy objective of behaviour modification is fostered through a class proceeding. If the drug is defective and liability attaches to the 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": see [*Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.)], at page 472. The CPA serves to assist in regulating the pharmaceutical industry for an important public policy objective through class proceedings commenced in the private sector.

[111] I am, of course, in no relevant sense bound by the decision in *Wilson* and must exercise an independent judgment on the facts of this case. Decisions on the preferable procedure reached on different facts can be of limited assistance. I do, however, consider the reasons of Cumming J. on the question to be equally applicable for the purposes of this motion. His comments on access to justice and judicial economy are just as appropriately applied to the facts of this case and, as Zyprexa continues to be marketed in Canada, the value to be attributed to behavioural modification would be enhanced to an even greater extent than in *Wilson*.

[112] I believe it is obvious that the resolution of the common issues will substantially advance the proceeding, one way or the other. Access to justice and judicial economy will be furthered by permitting issues of fundamental importance to the claims of each class member to be decided at a single trial. These will include the degree of risk, if any, attached to the use of Zyprexa – a question on which the opinions of the experts are materially in conflict. At this stage of the proceeding I am satisfied that the extensive powers and discretion conferred on the court by section 25 of the CPA should be adequate to permit the trial judge to fashion manageable procedures for resolving the individual issues in accordance with the civil standard of proof – and not in accordance with higher standards that the defendants' expert witnesses might apply to the

issues of causation on which defendants' counsel placed great emphasis. Although the plaintiffs have the burden of satisfying the court that the procedure under the CPA will be "workable" or manageable, and must do so on the balance of probabilities, I believe the court should be careful to ensure that, on this question in particular, it does not engage in unwarranted speculation and hold the plaintiffs to standards that assume a degree of foresight that neither they, nor the court, possess at this stage.

[113] I note that, in attempting to distinguish the decision in *Wilson,* defendants' counsel referred to the fact that the drugs there had been withdrawn from the market, and to the existence of a plea that they were unsafe for human consumption. In contrast, it is conceded that - if the alleged side-effects are ignored - Zyprexa is effective to treat the ailments for which it is primarily designed. However, although these distinguishing features may have relevance if *Wilson* is relied on at the trial of the common issues, they do not, in my judgment, bear significantly on the resolution of the individual issues.

[114] In supporting the preferability of individual actions, defendants' counsel asserted the significance of contingency fees and case management in facilitating them and ensuring their manageability and viability. In my opinion, this severely undervalues both the judicial economy that would be achieved by a trial of the common issues with, or without, those based on waiver of tort, and the enhanced access to justice that would likely be achieved. If accepted, it would also undercut any objection that the resolution of the individual issues would be prohibitively expensive for class members.

5. *Section 5 (1) (e) - the representative plaintiffs and the litigation plan*

[115] Three of the proposed representative plaintiffs - Andrea Heward, Daniel Wells and Kelly Hutchins - are members of the primary class. The others, as the spouses of such members, would be entitled to assert derivative claims under section 61 of the FLA or, in the case of Darlene Hutchins, under the similar legislation of Alberta. Each of these persons is a member of the secondary class that I have indicated would be acceptable for the purpose of certification and each of them has retained the competent counsel that represented them at the hearing. Charles M. Wright - a partner in one of a firms acting as class counsel - has sworn that, as a result of their communications with counsel, they understand the major steps in a class action and the responsibilities of being a representative plaintiff. In Mr Wright's opinion, they will fairly and adequately represent the interests of the class, and he has stated that he is not aware that, on the common issues, any of them has an interest in conflict with the interests of other class members.

[116] I see no reason to question Mr Wright's judgment on these matters. He, and his firm, have had extensive experience in class proceedings and, obviously, he is knowledgeable of what will be required of the proposed representatives. At this stage of the proceeding the likelihood that material conflicts of interest will arise is not apparent.

[117] Earlier in these reasons, when considering the requirement in section 5 (1) (a), I referred to a deficiency in the pleading of the derivative claims of Nancy Wells and Darlene Hutchins in that it is not alleged that they suffered any damages. Defendants' counsel submitted that, in view

of this, they could not be included within the class and, in consequence, cannot be accepted as qualified representative plaintiffs. Although I do not accept that the omission is sufficient to exclude them from the class, I agree that the pleading must disclose that a proposed representative plaintiff has a cause of action. My understanding is that the plaintiffs intend to remedy this defect by amendments to the statement of claim. If they do not do this, I would be prepared to accept Andrew Heward as the sole representative plaintiff for the secondary class and relegate Nancy Wells and Darlene Hutchins to the status of secondary class members. Contrary to the submission of defendants' counsel, I believe the cause of action in respect of the derivative claim of Andrew Heward has been adequately pleaded.

[118] Defendants' counsel relied also on the facts pleaded in paragraph 40 of the statement of claim for a submission that there will be a direct conflict of interest between the interests of class members who ingested Zyprexa in the period when the defendant is alleged to have knowingly concealed risks attached to the product, and those of members who did so at other times in the class period. I did not accept the submissions of counsel based on the significance of paragraph 40 when I was considering the adequacy of the class definition, and I do not do so for the present purposes. It was recognized in *Dutton* that it is not "essential that the class members be identically situated *vis-a-vis* the opposing party" (at para 39). I am not persuaded that conflicts between the interests of the proposed representative plaintiffs and those of class members will necessarily - or even probably arise - as the relative strengths of their various claims becomes apparent - or that, if such conflicts still arise, it will not be possible to rectify the problem by the creation of subclasses with separate representation.

[119] Finally, on the question whether the proposed representative plaintiffs will adequately represent the class, defendants' counsel referred to the absence of evidence of their ability to finance the proceedings leading to a trial of common issues. In *Pearson*, the Court of Appeal accepted that "the capacity of the representative plaintiff to fund the litigation is... one factor in determining whether the plaintiff can adequately represent the class", but stated that "there is no requirement under our legislation for the plaintiffs to demonstrate that they have concrete and specific funding arrangements in place" (para 94). I am not prepared to speculate – or attribute significance to the possibility that a large award of costs might be made against the representative plaintiffs if they are unsuccessful at a trial of the common issues. In the absence of evidence to the contrary, I believe I am entitled to presume that responsible counsel would not have accepted the retainer without ensuring that adequate arrangements would be made to finance likely disbursements prior to the trial.

[120] The proposed litigation plan is, in my judgment, adequate for the purposes of certification. The importance of any plan for such purposes, and the amount of detail required at this relatively early stage of the proceedings, will depend upon the particular circumstances of each case. Although - because of the light it may shed on the requirements of preferability and manageability - it has been repeatedly recognized that the contents of the plan may have an important bearing on the outcome of a certification motion, counsel should not be required to engage in a pointless exercise of attempting to predict how the litigation will unfold and then to provide in detail for every eventuality that might arise.

[121] The point just made is particularly relevant to a case like this where the nature, number and complexity of the individual issues to be dealt with after a trial of the common issues will depend on which, if any, of the common issues are decided in favour of the plaintiffs. If, for example, all of the common issues are resolved in that way, and the plaintiffs elect to pursue the restitutionary remedies rather than the claim for compensatory damages, the individual issues are likely to be significantly fewer, less complex and less contentious than those that would need to be addressed if only the claims for compensatory damages are held to be available. In the latter event, only the class members who developed diabetes, or one of the related complaints, after taking Zyprexa are likely to have tenable claims - other than claims for special damages - and it was conceded by defendants' counsel that they would constitute only a small fraction of the 575,000 individuals in Canada who, according to counsel's estimate, ingested the drug. If this turns out to be incorrect and, despite the findings of fact made at the common issues trial, individual determinations of the issues relating to causation and damages are found to be unmanageable, the possibility of decertification pursuant to section 10 (1) of the CPA will exist. I do not consider this possibility to be sufficiently likely to require rejection of the proposed litigation plan, or a finding that a class proceeding is not the preferable procedure.

[122] This approach is not inconsistent with the cases that have withheld certification on the ground that decisions on the common issues will be overwhelmed by the individual issues and, in reality, constitute just the commencement of the proceedings. When viewed in the context of the entire claim, a resolution of common issues that are "negligible in relation to the individual issues", makes it "difficult to say that [their resolution] will significantly advance the action": *Hollick,* at paras 32 - 33.

[123] In *Bellaire v. Independent Order of Foresters* (2004), 5 C.P.C. (4th) 68 (S.C.J.), at paras 53- 4, Nordheimer J. provided a list of nine matters that he indicated were examples of those that ought to be addressed in a litigation plan. Quite understandably, the learned judge did not attempt to specify the amount of detail required with respect to each of them. Nor did he suggest that they will be equally important in every case. He stated:

> Litigation plans will vary in the amount of detail they contain depending on the degree of complexity of the underlying claims. However, any litigation plan ought to contain some outline of how the representative plaintiff and his or her counsel intend to ensure that the common issues will be effectively and efficiently pursued if the action is certified. ... I appreciate that any litigation plan will be a work in progress. It will need to be adjusted as the action proceeds. It may also be that the defendant and the court will need to have some input into variations to the proposed plan. None of those realities, however, relieves the representative plaintiff from his or her obligation to put before the court, on the certification motion, an initial effort at a plan to address these and other matters so that the court can be satisfied that, if the action is certified, some level of attention has been given to how the action will progress thereafter.

[124] Most of the matters referred to by Nordheimer J. have been mentioned in the proposed litigation plan. In my opinion it contains sufficient detail for the purpose for which it is required at this stage of the proceeding. The progress of the litigation will, of course, continue to be under case management.

Conclusion

[125] For the above reasons, but subject to satisfactory amendments to the statement of claim, or other clarification, with respect to the matters referred to in paragraphs 20, 21, 22, 76, 77 and 117, there will be an order certifying the proceeding. The form of a notice to class members, its method of dissemination and – if the parties are unable to agree – the costs of providing notice, and the costs of this motion, can then be dealt with at a case conference.

CULLITY J.

Released: February 6, 2007

COURT FILE NO.: 05-CV-283309 CP
DATE: 20070206

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ANDREA HEWARD, ANDREW CHARLES HEWARD, KELLY HUTCHINS, DARLENE HUTCHINS, DANIEL WELLS AND NANCY WELLS

Plaintiffs

- and -

ELI LILLY & COMPANY AND ELI LILLY AND CANADA INC

Defendants

REASONS FOR DECISION

CULLITY J.

Released: February 6, 2007