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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
AHMAD SERHAN, DECEASED, BY HIS TRUSTEE WITHOUT A WILL, ZEIN AHMAD SERHAN AND BEVERLEY GAGNON	***Harvey T. Strosberg, Q.C., Paul J. Pape*** and ***Kirk Baert***, for the Moving Parties
Moving Parties/Plaintiffs	
- and -	
JOHNSON & JOHNSON, LIFESCAN CANADA LTD. AND LIFESCAN INC.	***Michael Barrack*** and ***Caroline Zayid***, for the Respondents
Respondents/Defendants	
	HEARD: April 7 and 8, 2004

REASONS FOR DECISION

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

CULLITY J.

The Proceedings

[1] The plaintiffs moved for certification of this action under *the Class Proceedings Act, 1992*. In the amended statement of claim they seek damages for negligence, negligent and

fraudulent misrepresentation, breach of section 52 (1) of the *Competition Act* and conspiracy relating to the defendants manufacture, sale and distribution in Canada of allegedly defective products to be used by diabetics to monitor their blood glucose levels. The products consisted of meters (the "SureStep meters") and strips ("Strips") to be used in conjunction with them.

[2] The SureStep meters were limited to those manufactured before August 1, 1997 and the Strips to those manufactured before March 1, 1998 and distributed on, or after, February 1, 1996.

[3] In addition, the plaintiffs claim that the defendants hold all the revenue generated from the sale of the products and other related items on a constructive trust for their benefit and for that of the other class members. There are also claims for an accounting, an order requiring the "disgorgement" of such revenues and for punitive damages.

[4] The class, as defined in the amended statement of claim, would consist of all persons in Canada - except British Columbia and Quebec - who used a SureStep meter, or a Strip, on, or after, February 1, 1996. The products were manufactured by the defendant, LifeScan Inc., which is a wholly-owned subsidiary of Johnson & Johnson. The third defendant, LifeScan Canada Ltd. is a Canadian corporation that is a subsidiary of LifeScan Inc., and markets its products in Canada.

The Facts

[5] The defendants have delivered a statement of defence in which they deny liability. They have opposed certification on the basis that the requirements in section 5 (1) of the CPA are not satisfied.

[6] The meters and the Strips were designed for home use. The meters are admitted to have been defective in that, in some cases, where they were intended to show the existence of a high blood glucose level, they would fail to do so. Instead, they would disclose that an error had occurred (the "ER1" problem). The meters were modified in July, 1997 and, thereafter, only corrected meters were distributed in Canada. In June, 1998, LifeScan Canada began to offer replacement meters for users of the affected meters and took steps to publicize this programme. By February 30, 2002, 21,321 corrected meters had been provided to users in Canada.

[7] The Strips were designed to be inserted in the meters after a drop of the user's blood had been placed on them. Blood would typically be obtained by pricking a finger with a lancet provided as part of the SureStep system. If the Strip was incompletely inserted by approximately a 15 thousandth of an inch or more, the meter could have provided an erroneously low reading instead of indicating either the correct reading or that an error had occurred. This problem (the "low flier problem") was addressed in February, 1998 when LifeScan Inc. approved the provision of modified Strips. These were marketed in Canada from June, 1998.

[8] By that time, federal agencies in the United States - including the FTA, the FBI and the Department of Justice - had commenced an investigation of LifeScan Inc.'s conduct with respect

to the products and, in December 2000, pursuant to an agreement with the prosecution, LifeScan Inc. pleaded guilty to three strict liability misdemeanours in the United States. These offences related to the provision of false and misleading reports to the FTA, the failure to furnish appropriate information to the agency and the introduction and delivery of an "adulterated and misbranded medical device" into interstate commerce. LifeScan paid a fine of $ 29,400,000 US pursuant to the agreement. In addition, it paid approximately the same amount to settle a lawsuit commenced by whistleblower employees of LifeScan Canada Inc. The plea agreement contained admissions that, as early as 1993, LifeScan Inc., had learned of the existence of the defects with the meters and the Strips.

[9] Experts whose affidavits were delivered on behalf of the parties differed with respect to the likelihood that either of the problems that accompanied the use of the SureStep system would lead to serious short-term consequences, or long-term complications. They also disagreed on a number of other matters including:

(a) the prevalence of home glucose monitoring;

(b) the extent to which the results of home monitoring are typically relied on for the purpose of treatment decisions;

(c) the extent to which such decisions are made by diabetics independently of their physicians;

(d) the likelihood that symptoms of serious adverse consequences of relying on the meters would be recognized; and

(e) the extent to which affected meters were still in use by diabetics in Canada as of May, 2003.

[10] The opinion of Dr Robert M. Ehrlich, in an affidavit filed on behalf of the plaintiffs, was that each of the defects with the SureStep system - and, particularly, the ER1 problem - could have serious health consequences for a user with an undetected high blood glucose level. In the case of the ER1 problem these would arise if the test was not repeated or, if repeated, and an ER1 reading was again obtained, no further steps were taken. The risk of adverse consequences of relying on a low-flier reading would be that the user would reduce his, or her, insulin consumption below that required to maintain a satisfactory level of glucose in the blood.

[11] On the other matters to which I have referred, Dr Ehrlich's opinions generally attributed much greater significance, and seriousness, to the existence of the defects in the products for their users than the expert affidavit evidence filed on behalf of the defendants.

[12] There is, however, virtually no evidence that either of the representative plaintiffs, or any other members of the putative class, suffered any injurious effects to their health by using the meter or the Strips other than the pain involved in obtaining additional blood samples. Paragraph 78 of the amended statement of claim states as follows:

78. As a result of the defendant's negligence, conspiracy, fraudulent or negligent misrepresentation and breach of section 52 of the Competition Act, the plaintiffs and other class members who received and used a SureStep meter and/or Strips

(a) suffered damages because he or she was at risk, which damages include:

(i) the amounts paid for the SureStep meter and/or Strips;

(ii) out-of-pocket expenses incurred by the Class Members for their benefit, such as the costs to return the SureStep meters;

(b) also suffered damages and loss, including:

(i) personal injury, including pain and suffering from repuncturing fingers to draw additional blood samples as a result of erroneous readings;

(ii) diabetic shock; and

(iii) loss of income.

[13] There is no evidence on this motion that the representative plaintiffs, or any member of the proposed class, suffered diabetic shock, or loss of income. Mr. Serhan - who died after the commencement of this action - is stated to have encountered the ER1 problem and, as a result, to have had "to re-test, meaning that he had to use additional Strips and Associated Paraphernalia and that he had to repuncture a finger with a lancet to draw additional blood samples, a process which, each time, caused him pain and suffering."

[14] The injury suffered by Ms Gagnon as a consequence of the low flier problem was described in identical terms in the pleading.

[15] In an affidavit sworn by Mr. Serhan, he stated that he had once obtained an ER1 reading and subsequently determined that his blood glucose level had been high. On other occasions, he had obtained erroneously low glucose readings. As a consequence, he had to re-test. He found it painful to puncture his fingers with a lancet. Ms Gagnon's affidavit evidence was to the same effect as a result of the low flier problem she encountered.

[16] Mr. Serhan was provided with his meter in hospital without any cost to him. It was subsequently replaced by the defendants. Ms Gagnon never owned an affected meter. Her Strips – like Mr. Serhan's meter - were paid for by the Ontario Drug Benefit Program. There is no evidence that any other member of the putative class actually paid for either the meters or the Strips.

[17] 43,902 of the affected SureStep meters were sold, or otherwise distributed, in Canada. As already mentioned, 21,321 of these were replaced with corrected meters by February 30, 2002. As well as the users of the affected meters, the proposed class would include individuals such as Ms Gagnon who used defective Strips with corrected meters.

Certification

[18] I will consider the requirements for certification in section 5 (1) of the CPA in turn.

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

[19] Initially, it was proposed to raise the issues that arise under section 5 (1) (a) on a preliminary motion by the defendants to strike parts of the amended statement of claim pursuant to rule 21.01 (1) (b). It was ultimately decided that they could be appropriately dealt with at this stage of the motion for certification.

[20] The causes of action on which the plaintiff relied are pleaded against all of the defendants on the basis that their businesses were organized, co-ordinated and operated as if they consisted of a single entity under the control and direction of the Executive Committee and Professional Group Operating Committee of Johnson & Johnson. Each of the defendants is stated to be the agent of the others and, as such, vicariously responsible for the acts and omissions particularized in the amended statement of claim.

[21] The plaintiffs plead that the SureStep meter and the Strips were dangerously defective, that the defendants were negligent in selling the devices when they had prior knowledge of the defects, that they made negligent, or fraudulent, misrepresentations to the users of the equipment in Canada, that, in so doing, they breached section 52 of the *Competition Act* and that the users suffered the economic losses and personal injuries referred to earlier in these reasons. I am satisfied that the constituent elements of these causes of action and material facts that would be required to support them are sufficiently disclosed in the pleading. Although, in their factum, defendants' counsel disputed the plaintiffs' ability to claim damages for negligence for pure economic loss, counsel conceded at the hearing that, in view of the claim that the products were dangerously defective, the pleading was not objectionable on this ground.

[22] Counsel for the defendant challenged the additional claim that a constructive trust attached to the revenues received by the defendants from the sale of the meters and the Strips and, less strongly, the claim for conspiracy.

[23] The claim of constructive trust was pleaded as if it were a separate cause of action rather than a remedy. The concept of a cause of action has most commonly been understood to refer to the material facts that must be proven - and pleaded - to entitle the plaintiff to a remedy against the defendant: *Letang v. Cooper*, [1964] 2 All E.R. 929 (C.A.), at page 934; *Dumoulin v. The Queen* (S.C.J. Reasons, June 30, 2004). It is possible to have cases in which, although the statement of claim pleads material facts that, if proven, would establish a breach of duty - and in

the above sense discloses a cause of action - the remedy requested would be unavailable. In *Wong v. Sony of Canada Ltd,* [2001] O. J. No. 1707 (S.C.J.), for example, a claim for punitive damages for breach of the *Competition Act* was struck pursuant to rule 21.01 (1) (b). Cumming J. stated:

> Section 36 (1) the Competition Act provide[s] that punitive damages are not permitted pursuant to the legislation. A claim for punitive damages is dependent upon the pleading of a separate cause of action that would permit such damages.

[24] It appears, therefore, that, for the purposes of rule 21.01 (1) (b) and section 5 (1) (a), the question whether a cause of action has been disclosed must be considered in relation to each remedy claimed. A cause of action may have been disclosed in respect of one or more remedies but not others. Material facts must have been pleaded that, if proven, could entitle the plaintiff to the particular remedy claimed.

[25] In view of the flexibility that now exists in the court's choice of remedies, cases in which claims for specific forms of relief for breaches of common law, or equitable, duties will be disallowed on the basis of the pleading are not all that common. More usually, successful challenges under rule 21.01 (1) (b), or section 5 (1) (a) are made on the ground that, if proven, the facts pleaded would not entitle the plaintiff to any relief.

[26] Here, however, the submission made on behalf of the defendants was, in effect, that the claim for a constructive trust falls within the former category: that it is plain and obvious that the remedy would not be available even if the causes of action – that, for the purposes of this motion, were conceded to have been disclosed - were proven. It is implicit in the submission that material facts necessary to support the claim for a constructive trust have not been pleaded.

[27] As pleaded, the claim for a constructive trust appears to have been based on each of the varieties discussed, and distinguished, in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 - unjust enrichment, and property acquired by a wrongful act. In a reply factum, and at the hearing, however, plaintiffs' counsel disclaimed reliance on a trust based on unjust enrichment and relied exclusively on the existence of a constructive trust of the second kind. However, as was recognized in Soulos (at page 237), the categories are not mutually exclusive:

> Often wrongful acquisition of property will be associated with unjust enrichment, and vice-versa.

[28] The distinction, therefore, is not between cases in which there has, and has not, been unjust enrichment but, rather, between those in which proof of unjust enrichment is not essential to the claim and those in which the three-pronged test of enrichment, a corresponding deprivation and the absence of a juristic reason, must be satisfied. In cases of constructive trusts arising from wrongful conduct, the extent to which the defendant was unjustly enriched may be relevant to, and even determine, the extent to which the trust attaches.

[29] The basis of the claim is set out in paragraphs 74 and 75 of the amended statement of claim as follows:

> 74. The plaintiffs and the other Class members trusted and relied upon the Defendants, because of their reputation in the marketing of medical devices and healthcare products, to produce a meter and Strips each fit to measure blood glucose levels and free from known defects. The Defendants profited from that trust by receiving increased revenue which is directly attributable to the conspiracy and false Representation.
>
> 75. The plaintiffs plead that good conscience requires the defendants to hold in trust for the plaintiffs and the other Class members all revenue they received in Ontario and elsewhere in Canada from the sale of SureStep meters, the Strips and the Associated Paraphernalia and to disgorge this revenue.

[30] These general allegations are then repeated and particularized in paragraph 76 which states that, but for the alleged misrepresentation and conspiracy, the revenues would not have been received, that the defendants had been unjustly enriched and that they had engaged in wrongful conduct and had breached an obligation to class members in marketing a medical device that they knew was dangerously defective without warning users of the defects and their potential consequences.

[31] Mr. Strosberg cited, and relied on, the following passages from the judgment delivered by McLachlin J. on behalf of the majority of the court in Soulos (at pages 240-1):

> This case requires us to explore the pre-requisites for a constructive trust based on wrongful conduct. ... I would identify four conditions which generally should be satisfied:
>
> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendants must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiffs;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remained faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all circumstances of the case; e.g., the interests of intervening creditors must be protected.

[32] Counsel for the defendants submitted that none of the conditions stated by McLachlin J. is satisfied on the basis of the facts pleaded. There was, in his submission, no equitable obligation, no actual or deemed agency or other fiduciary relationship between the parties, no

legitimate reason for seeking a proprietary remedy rather than damages and no justification in attaching a trust to the cost of the products to users as distinct from the profits obtained by the defendants.

[33] As far as the first condition is concerned, fraud has been pleaded and is one of the traditional heads of equity jurisdiction - a jurisdiction that was concurrent with that of courts of common law: see *Nocton v. Lord Ashburton*, [1914 - 15] All E.R.Repr. 45, *per* Viscount Haldane L.C. (at para 10, QL). I do not see any difficulty in holding that a party who has obtained property of another by fraudulent misrepresentations has breached an obligation of the type courts of equity have enforced. In addition, in cases where the "doctrine" of waiver of tort applies, the equitable remedy of an accounting of profits will often be appropriate and has often been granted: see Maddaugh and McCamus, *The Law of Restitution* (2nd edition, 2004), at pages 745-6; *Attorney-General v. Blake,* [2001] 1 A.C. 268 (H.L.), at page 279.

[34] Waiver of tort, by that name, has not been pleaded but, as well as the general - and by themselves probably inadequate - references to good conscience, paragraphs 74-76 of the statement of claim do, I believe, allege material facts that if proven, could entitle the plaintiffs to a remedy on the basis of the doctrine. Such facts would constitute a cause of action for which the remedies of a constructive trust or, alternatively, an accounting of revenues, are claimed. Claims based on waiver of tort seek "restitution" of benefits received by the defendants, as a consequence of their tortious conduct rather than damages to compensate the plaintiffs for a loss. The basis of the doctrine is encapsulated in a passage from an American decision that is quoted by Maddaugh and McCamus, at page 739:

> The point is not whether a definite something was taken away from plaintiff and added to the treasury of defendant. The point is whether defendant unjustly enriched itself by doing a wrong to plaintiff in such manner and in such circumstances that in equity and good conscience defendant should not be permitted to retain that by which it has been enriched. (*Federal Sugar Refining Co v. United States Sugar Equalization Board* 268 F. 575 (S.D.N.Y., 1920), at page 582).

[35] Waiver of tort, as a cause of action, is said to have the advantage for a plaintiff that proof of loss as an element of the tort is not required: see *Amertek Inc v. Canadian Commercial Corporation*, [2003] O.J. No. 3177 (S.C.J.); *Transit Trailer Leasing Ltd v. Robinson*, [2004] O. J. No. 1821 (S.C.J.); Maddaugh and McCamus, at pages 743-4. If it exists, this advantage may have a special significance when common issues are to be identified for the purposes of the CPA.

[36] The discussion of the English law relating to waiver of tort in the latest edition of Goff and Jones - and, in particular, the decision of the Court of Appeal in *Stoke-on-Trent City Council v. W. & J. Wass Ltd,* [1988] 3 All E. R. 394 - suggests that benefits in excess of the actual loss suffered by class members would not be recoverable in that jurisdiction. The learned authors – and also Maddaugh and McCamus at pages 742-4 - are critical of this result. In the two recent decisions of this court, the view of Lord Denning in *Strand Electric & Engineering Company v*

The Brisford, [1952] 1 All E.R. 796 (C.A.) that benefits are recoverable even though the plaintiff suffers no loss was accepted. As Cusinato J. stated in Transit Trailer Leasing Inc. (at para 89):

> As outlined by Lord Denning, only the benefit received by the defendants is germane and relevant and this is true even if in fact the [plaintiff] is not able to establish loss.

[37] Lord Denning's analysis was not applied in Stoke-on-Trent City Council but, in view of its recent acceptance in this court, I do not believe it would be appropriate to reopen the question in this procedural motion.

[38] It has been held more than once that a motions judge should be slow to strike novel causes of action or those in an area of the law that is unsettled, or undergoing significant change or development. In my opinion, the law relating to waiver of tort falls within each of these categories. In particular, although there are many cases in which remedies have been granted on the basis of the "doctrine" of waiver of tort, its scope, and the extent to which it reflects general principles, have not, as far as I am aware, received authoritative analysis in Canadian appellate courts.

[39] Similarly, Goff and Jones, at page 783, state:

> ... no English court has sought to weave any sophisticated golden thread to unite the cases on "waiver of tort"

and the learned authors doubt (at pages 776-7) whether English law is "sufficiently mature" to adopt a general principle that recognizes an independent restitutionary claim based simply on the wrongful acquisition of a benefit.

[40] The application of the second condition in Soulos to the facts of this case raises a question of some difficulty. As stated, the relevant passage suggests that a constructive trust based on the defendants' wrongful conduct can arise only where a " deemed or actual" agency relationship existed. On the facts of this case, there was no agency relationship and I do not see any ground on which one could be deemed to exist.

[41] There was an agency relationship in Soulos and, throughout her judgment, the analysis of McLachlin J. places considerable emphasis on wrongful conduct by fiduciaries. Although the learned judge recognized that constructive trusts based on wrongful conduct may extend beyond such situations, she referred in this context only to a breach of "a trust-like duty" (at page 229). In other places, however, she referred more generally to wrongful conduct "like breaches of fiduciary duty" (page 230), to a statement of Professor Austin Scott (*Scott on Trusts*, third edition, at paragraph 3410) that a constructive trust will be "available where property is obtained by mistake, by fraud or by other wrongs" (page 238), and she stated (at page 238):

> Applying the English law, [Canadian courts] have long found constructive trusts as a consequence of wrongful acquisition of property for example by fraud or

breach of fiduciary duty. Similarly, Maddaugh and McCamus, *The Law of Restitution* (1990) state (at page 86):

> Chancery's willingness to impose a constructive trust in circumstances where a fraud has been perpetrated is by no means a modern development. No pre--existing fiduciary relationship need be established for this category of constructive trust and, indeed, a breach of trust or other fiduciary obligation is, in itself, simply one form of equitable fraud.

[42] As in such cases it appears that the emphasis has traditionally been placed on the existence of fraud rather than on any breach of duties of loyalty or fidelity, I believe it is unlikely that the references to "agency activities" in Soulos were intended to limit the availability of the remedy to cases of fraud, or other wrongful conduct, by agents. I believe it is more likely that such references reflected only the particular facts of the case before the court. As Professor D.W.M. Waters stated in *The Constructive Trust* (1962):

> ... Equity is evidently concerned with an event rather than a relationship. The offence is the conduct which brought about the acquisition; the courts are not primarily concerned with the relationship that was thereby abused. (at pages 55 - 6.)

[43] The third and fourth of the conditions stated in Soulos are not, I think, appropriately dealt with on the basis of the pleadings alone. The third may be affected by a decision with respect to other remedies available at trial and the fourth is one on which evidence may be required.

[44] As far as the third condition is concerned, I note that the plaintiffs seek the proprietary remedy of a constructive trust in a situation where it is not alleged that each class member had any pre-existing legal or equitable interest in the property that would be the subject matter of the trust. Its existence is not premised on payments made by class members to acquire SureStep meters or Strips and it is not said to benefit only those members who paid for them. Nor is the property to which the trust would attach identifiable specifically as a separate, or mixed, fund or otherwise. In the present developing state of the law, I do not think either of these objections is necessarily fatal to the claim: see Goff and Jones, *The Law of Restitution*, (6th edition, 2000), paras 2.010 - 2.014; Maddaugh and McCamus, at page 124; *cf., LAC Minerals Ltd v. International Corona Resources Ltd*, [1989] 2 S.C.R. 574 *per* La Forest J., at pages 676-77.

[45] Similarly, although, at paragraph 36 - 018 of their treatise, Goff and Jones conclude that the existence of traceable proceeds of a tortious exploitation of a plaintiff's undisputed title to, or possession of, property is a prerequisite to a proprietary claim to proceeds acquired through tortious conduct, the English decisions on which the conclusion is based appear to be inconsistent with the remedial nature of the constructive trust recognized in Canada and referred to in Soulos, at page 228.

[46] While I recognize that the introduction of waiver of tort principles - for which proprietary, as well as personal, remedies may be available - into cases of products liability may have serious and, possibly, far-reaching implications, I do not believe that the law is at present

sufficiently clear to permit me to strike the claim for a constructive trust solely on the basis of the pleadings, or to find that it does not satisfy the requirement in section 5 (1) (a). If, at a trial, it is found that waiver of tort principles are applicable, but that a proprietary remedy is not appropriate, this would not exclude the possibility of the personal restitutionary remedy for an accounting and disgorgement that the plaintiffs have claimed in the alternative.

[47] The defendants' objection to the inclusion of the claim for conspiracy was based on their submission that the allegations of unlawful conduct in furtherance of the alleged conspiracy are essentially the same as those pleaded in support of the other causes of action on which the plaintiffs relied. In these circumstances, defendants' counsel submitted that the claim for conspiracy merged with the other actionable wrongs and should be struck as irrelevant. They relied on the very strong comments to this effect of Lord Denning M.R. in *Ward v. Lewis*, [1954] 1 All E. R. 55 (C.A.). In response, Mr. Strosberg referred to the equally clear comments of Wilson J. in *Hunt v. Carey*, [1990] 2 S.C.R. 959, at pages 991 – 2 in which the learned judge indicated that the question of merger should be left to the judge at a trial and should not be dealt with on a motion to strike. In dealing with a similar argument to that advanced in this case, she stated that there were at least two problems with it:

> First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the facts as pleaded are true, I do not think that is open us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts. Thus, even if one were to accept the appellants' (defendants) submission that "upon proof of the commission of the tortious acts alleged" in paragraph 20 of the plaintiff's statement of claim " the conspiracy merges with the tort", one simply could not decide whether this "merger" had taken place without first deciding whether the plaintiff had proved that the other tortious acts had been committed.
>
> This brings me to the second difficulty I have with the defendant's submission. It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This is a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial

> judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

[48] I believe that these comments apply equally to the facts of this case. The plaintiffs might, or might not, succeed in establishing their plea that each of the defendants was an agent of the others and that each should be found liable under the other causes of action that have been pleaded. I am not prepared to assume that, if agency was not established and, for example, only one of the defendants was found to have made fraudulent misrepresentations and to have incurred liability on that basis, the other two defendants could not be found liable for conspiring with that defendant to defraud the plaintiffs in that manner. In such a case, I doubt whether the cause of action in conspiracy against the two defendants would merge with the other cause of action. In consequence, it would be premature to deal with the question of merger at this stage of the proceedings and there can be no question of striking the plea of conspiracy on the basis that merger will occur.

[49] The constituent elements of actionable conspiracy having been pleaded, I find that that the statement of claim adequately discloses this cause of action.

Section 5 (1) (b) - the existence of an identifiable class

[50] As amended at the hearing, the proposed class can be defined as follows:

> All individuals in Ontario and elsewhere in Canada, except British Columbia and Quebec, who acquired a SureStep meter on or after February 1, 1996 and/or who used a Strip on or after February 1, 1996, and the personal representatives of any such individuals who have died.

[51] In the submission of defendants' counsel, the restated definition is still open to objection on two separate grounds. The first is that it is virtually inevitable that factual issues will arise in determining whether particular individuals owned meters, or used Strips, and no procedure for resolving such issues is provided in the litigation plan or otherwise. The second is that the class is over-inclusive as it will include persons who suffered no damage or loss from using the products because they never experienced either of the problems created by the defects. The ER1 problem would affect only diabetics with an unusually high blood glucose level and the low flier problem would arise only if Strips were not properly inserted in a meter. Some individuals who encountered one, or the other, of the problems may never have retested and suffered any physical injury or adverse health consequences. Those who had not paid for the products, or who had received replacement meters, may not have incurred any economic loss.

[52] I am satisfied that each of these objections has some validity but that the important questions relate to the weight to be given to them. By itself, the necessity to resolve questions of

fact in determining whether an individual is within a class is not a compelling objection. Some such process will often be necessary. Indeed, in its *Report on Class Actions*, the Ontario Law Reform Commission indicated that it believed it was apparent from *Naken et al v. General Motors of Canada Ltd et al* (1983), 144 D.L.R. (3d) 385 (S C.C.) - a decision under the former Rules of Practice dealing with representative actions – that

> The mere fact that the court may be required to enter upon a relatively elaborate factual investigation in order to determine class membership ... does not render the class definition any less adequate. (at pages 373 –4)

[53] It is, of course, unnecessary that the identity of each member of a putative class, or even the size of a class, be known at the time of certification. The members must, however, be identifiable by means of criteria that the court can apply to determine whether a person is, or is not, within the class of those who have potential claims for relief, who will be bound by the decision and who are entitled to notice.

[54] Here, the proposed criteria - ownership of a meter or use of a Strip - are sufficiently certain. Putative class members should be able to determine whether they are included and any difficulty in applying the criteria in the event of disputes is likely to consist more in determining the credibility of individual claimants. In *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, the Supreme Court of Canada accepted a class definition in terms that confined members to those who claimed to have suffered damage as a result of the conduct of individuals for which the defendants were responsible. As far as the requirements of section 5 (1) (b) are concerned, I see no reason why each of the defendants' objections cannot be met by making similar modifications to the proposed definition. This would not involve a denial of validity, or weight, to the objections of the defendants: their relevance would remain to be considered in the context of the requirement in section 5 (1) (d) relating to the preferred procedure and, to that extent, the modifications merely adjust the focus of the inquiry.

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

[55] The plaintiffs identified 13 common issues as follows:

> (a) Did the defendants, or any of them, know that the SureStep Meter and Strips were defective before they were first marketed? If so, what were the defects and who knew what and when?
>
> (b) Were the defendants, or any of them, negligent and, if so, who, when and how?
>
> (c) Did the defendants, or any of them, have a duty to warn the class members of the defects in the SureStep Meter and Strips and, if so, did they warn in a timely and appropriate manner?

(d) Did the defendants, or any of them, represent that the SureStep Meter and Strips were each fit to measure blood glucose levels and free from known defects (the "Representation")?

(e) Did the defendants, or any of them, make a representation negligently or fraudulently, knowing it was false and misleading or recklessly, caring not whether it was true or false, or without exercising reasonable care and attention?

(f) Did the defendants, or any of them, make a Representation to induce the class members to acquire the SureStep Meter and Strips, or part thereof?

(g) Did the members of the class rely upon the Representation by acquiring a SureStep Meter and/or Strips?

(h) Did the defendants, or any of them, and their officers, directors, employees, servants or agents, conspire to market, sell, distribute and promote the SureStep Meter and Strips with knowledge of the defects and, if so, who conspired, where, when and how?

(i) If the conspiracy is established, should the court assess aggregate damages at large? If so, why, in what amount and for whom?

(j) Are the defendants, or any of them constructive trustees for the proceeds of their sales of the SureStep Meter and Strips and any other income made by them in connection with the SureStep Meter, Strips and Associated Paraphernalia, including the lancets and control solution? If so, should these damages be assessed globally? If yes, why and in what amount and for who?

(k) Are the defendants, or any of them, liable to pay damages to the class members on a restitutionary basis in an amount equal to the income or profits made by them in connection with the SureStep Meter, Strips and Associated Paraphernalia, including lancets and control solution, and the market share they maintained by entering into the conspiracy? If so, should these damages be assessed globally? If yes, why and in what amount and for whom?

(l) Should the full cost of distributing any aggregate damages and administering the plan be fixed, or assessed on an aggregate basis, under the *Class Proceedings Act* and, if so, who should pay and in what amounts?

(m) Should one or more of the defendants pay punitive damages? If so, who should pay punitive damages, why, in what amount and to whom?

[56] Subject to the qualifications that proof of causation and loss in negligence and conspiracy - and causation, loss, and, possibly, reliance as prerequisites for liability for negligent and fraudulent misrepresentation - are individual issues, I am satisfied that proposed common issues (a) through (f) and proposed issue (h) raise issues that have the required attribute of commonality. However, it follows that, because of the existence of the individual issues I have mentioned, a trial of these common issues would not determine whether the defendants are liable in tort for damages.

[57] Mr. Strosberg submitted that the question of reliance raised in proposed common issue (g) could be dealt with on a global basis - that reliance might be inferred on the basis of the defendants' conduct without evidence of actual reliance by each, or any, class member. For this purpose, he relied on the decision of Cumming J. in *Mondor et al v. Fishermen et al*, [2001] O.J. No. 4620 (S.C.J.). There, the learned judge was dealing with a motion to strike pleadings pursuant to rule 21.01 (1) (b) on the ground that allegations of negligent and fraudulent misrepresentation against certain defendants disclosed no cause of action. The alleged representations related to the legitimacy of the business of a particular corporation whose shares were listed publicly. This, allegedly, affected the market price of the shares. The defendants asserted that the plea, in effect, incorporated an American "fraud of the market theory" which is not part of the law of Canada. Cumming J. did not accept this interpretation of the plea and declined to strike it. In so doing, he accepted that the trial judge might infer reliance of the basis of the facts alleged in the statement of claim if they were proven.

[58] In Mondor, Cumming J. did not suggest that an inference of reliance drawn from the conduct of class members in purchasing shares after the representations were made could not be rebutted by evidence that there was, in fact, no causal connection between the representation and the decision to purchase. The possibility of such a rebuttal was recognized explicitly in a passage he quoted from the reasons delivered by Finch J.A. in the Court of Appeal for British Columbia in *Kripps v. Touche Ross & Co*, [1997] B.C.J. No. 968, at paragraph 103. Given the test applicable to motions to strike under rule 21.01 (1) (b), this possibility was not material to the resolution of the issue in Mondor. Here, however, the question is significantly different. It relates to the commonality of the issue of reliance and not to whether the plaintiffs have any chance of success on that issue. In determining whether any inference of reliance arising simply from the conduct of class members in purchasing, or using, the devices was rebutted, the defendants would be entitled to inquire into the motivation of, and examine, every member of the class. As Winkler J. stated in *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236, at page 241:

> Reliance is not established by a mere showing that a plaintiff was a recipient of a representation, rather the representation must have caused the recipient to act in a certain manner.

[59] Whether reliance should be inferred is a question of fact and the answer may differ from individual to individual. Mondor, was distinguished on this ground by Nordheimer J. in *Pearson v. Inco Ltd*, [2002] O. J. No. 2764 (S.C.J.), at paras 112-3. The defendants may, or may not, have difficulty in rebutting any inference, or presumption, of reliance that is found to arise but the possibility should not be foreclosed on this motion.

[60] As the most that a court could find on the basis of the conduct of class members is that a rebuttable inference of reliance arose, I do not believe this can be included as a common issue whose resolution would significantly advance the proceeding. Nor can the resolution of the issue be considered to be necessary for the determination of each class member's claims as the authorities require: *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534, at page 554; *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158, at page 171. The plaintiffs have pleaded reliance *simpliciter*, as well as reliance inferred from their conduct. The issue of reliance would remain open whether or not the court found for, or against, the plaintiffs on the question whether a rebuttable inference of reliance should be drawn.

[61] I am not prepared to certify the action on the basis of the common issues I have identified as included in proposed common issues (a) through (h). Although there is no requirement that the common issues to be tried should predominate over the individual issues that will remain, resolution of the former must advance the proceeding significantly if the objectives of the CPA are to be achieved. As Mr. Strosberg conceded, the elements of causation and proof of loss are usually individual issues in relation to claims of negligence. Their significance for the resolution of the proceedings will vary from case to case. In the present circumstances, factual issues and questions of credibility may have to be determined separately in respect of each member of a class of 40,000, or more, individuals. On the question of causation, mini-trials may be required to determine whether each class member experienced either the ER1 problem or the low-flier problem; if so, whether the problem was attributable to the particular defects or to another of the potential causes that the defendants have identified; and whether the existence of the problem caused the member injury through re-testing or otherwise, or economic loss. These are not questions that are likely to be resolved on the basis of any evidence other than that of each class member with respect to his, or her, personal experiences. The evidence of the experiences of each of the representative plaintiffs indicates that the issues of causation are very real.

[62] Whether or not a class member - unlike each of the proposed representative plaintiffs - paid for the devices, the legal costs involved in proving causation and recovering damages on an individual basis could very well be so far in excess of the amount that might be recovered to make the risk of pursuing the claim uneconomic.

[63] These difficulties apply equally to the claims of conspiracy and misrepresentation and the question of reliance would be an additional individual issue for the latter. However, to the extent that proof of loss may not be required for the purpose of the restitutionary claims for a constructive trust, or an accounting, based on the principles governing waiver of tort, the allegations of conspiracy by an unlawful act could provide a basis for such claims.

[64] Proposed common issues (j) and (k) relate to the proprietary and personal restitutionary claims pleaded for benefits acquired by the defendants as a consequence of their alleged tortious, and otherwise unlawful, conduct. As I indicated when considering the requirement in section 5 (1) (a), I believe these claims fall into areas of Canadian law that are far from settled.

[65] Insofar as a claim based on a waiver of tort presupposes that a tort has been committed, the individual issues involved in the claims of fraud and misrepresentation would preclude acceptance of the restitutionary claims as common issues based on those wrongs. However, the plaintiffs also allege that the defendants conspired to cause products that they knew to be dangerously defective to be marketed, that the conspiracy was directed towards diabetics and potential users of the products - including class members - and that the defendants knew that it was likely to cause injury and loss to such persons. As part of the conspiracy, the defendants are alleged to have agreed with each other to submit false information to regulatory bodies, to conceal the existence of the defects from class members and to mislead them with respect to the efficacy and safety of the products. The seriousness of these allegations is reflected in the heavy fines paid in the United States. If the allegations are proven at a trial of common issues and if, in law, no proof of loss is required for restitutionary remedies available in cases of waiver of tort, the defendants may be found liable to disgorge all or part of the benefits they received from marketing the products. In these circumstances, either the proprietary remedy of a constructive trust, or a personal remedy for an accounting and disgorgement, might be granted. Whether the doctrine of waiver of tort applies – and, if so, which of the remedies would be available - are not questions to be determined on this procedural motion. I am concerned with the identification of common issues of fact and law - not with their resolution.

[66] Issues (j) and (k), with some modifications to the terms in which they have been stated, possess both the required element of commonality in respect of each member of the proposed class and the potential to advance the proceeding significantly. Accordingly, I believe they satisfy the requirement in section 5 (1) (c) of the CPA. In view of this conclusion, I believe proposed common issues (l) and (m) are also acceptable to the extent that they are consequential on the resolution of common issues (j) and (k). Issue (i) could be reformulated so that it refers not to damages but, rather, to the amount for which the defendants may be liable to make restitution. Section 24 (1) of the CPA that permits aggregate awards refers to an assessment of "monetary relief" and is not, in its terms, restricted to damages as compensation for losses suffered by the class. The possibility of an aggregate award is incorporated in the restatement of issues (j) and (k) at the end of these reasons.

[67] The plaintiffs' case on this motion - and the litigation plan filed - were to a large extent based on assumptions that liability could be established at a trial of common issues and that an aggregate assessment of damages would be made. In view of my findings, these assumptions are valid only in respect of the common issues relating to the restitutionary remedies of constructive trust and an accounting of revenues or profits.

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

[68] I am satisfied that a class proceeding is appropriate for the determination of the common issues I have accepted for the purposes of certification and far preferable to individual trials. Their resolution in favour of the plaintiffs should determine both the issue of liability and the amount to be paid to class members. If they are decided in favour of the defendants, that will

very likely dispose of the litigation for class members other than any who may claim to have suffered serious injury to their health. There is no evidence at present that there are any such members. Each of the three objectives of the CPA - access to justice, judicial economy and behavioural modification - would be served by certifying the action on the basis of these common issues.

[69] Even if I were to accept as sufficiently significant the common issues I have found to be included in the claims for damages for negligence, misrepresentation and conspiracy, the defendants have advanced strong arguments against finding that a class action would be the preferable procedure for resolving such claims. In particular, the *de minimis* amounts likely to be recovered as compensatory damages by many and, perhaps, most class members and the serious doubt whether many class members would take the risk of litigating the individual issues suggest that either judicial economy would likely be threatened, or access to justice would not be improved significantly, by certification on the basis of such common issues.

Section 5 (1) (e) - A suitable representative plaintiff

[70] The defendants challenged the ability of each of the named plaintiffs to fairly and adequately represent the class. The late Mr. Serhan's estate is said to be unsuitable because it has no assets and because his son, Zein Serhan, as estate trustee, lacks intimate and detailed knowledge of his father's experience with his SureStep meter. With respect to the first of these points, I am not sure why it is assumed that the estate trustee would not incur personal liability for any costs awarded to the defendants.

[71] The second point is more serious. As a general rule, a representative plaintiff should, I believe, be able to testify, and be examined, with respect to the facts on which the representative claim is based. If Mr. Serhan's inability to do this would prevent his personal claim from being proven, I do not believe his estate trustee would be acceptable as a representative plaintiff. However, the focus of the trial of the common issues will be on the conduct of the defendants rather than the experiences of the plaintiffs and other class members. Evidence of Mr. Serhan's personal experiences with the meter should not be essential to the establishment of either of the restitutionary claims. In the circumstances, I believe the estate trustee should be permitted to continue the litigation commenced by Mr. Serhan before his death.

[72] The defendants' objections to Ms Gagnon are essentially that her chances of recovering anything other than de *minimis* compensatory damages are so small that she has no real interest in advancing the litigation. Given the nature of the restitutionary common issues I have accepted, this is simply not correct. Recovery under either issue would be measured by the benefits received by the defendants and not by the damage or loss suffered by Ms Gagnon.

Conclusion

[73] For the above reasons, I am prepared to certify this action on the basis of the common issues I have accepted. I would reformulate them as follows:

> (1) Are the defendants, or any of them, constructive trustees for all, or any, class members of all, or any part of, the proceeds of the sales of the SureStep Meter and Strips and any other income made by them in connection with the SureStep Meter, Strips and Associated Paraphernalia, including the lancets and controlled solutions? If so, in what amount and for whom are such proceeds held?
>
> (2) Are the defendants, or any of them, liable to account to all, or any, of the class members on a restitutionary basis for all, or any part of, the proceeds of the sales of the SureStep Meter and Strips and any other income made by them in connection with the SureStep Meter, Strips and associated paraphernalia, including the lancets and controlled solutions? If so, in what amount and for whose benefit is such accounting to be made?
>
> (3) should one or more of the defendants pay punitive damages? If so, in what amount and to whom?
>
> (4) who should pay the cost of administering and distributing amounts to which class members are entitled and how, and when, should such cost the determined?

[74] The litigation plan that has been filed is satisfactory except that: (1) the references to damages for personal injury must be deleted; and (2) the SureStep Compensation Plan attached as Schedule 2 is to be replaced with a reference to a decision of the court on common issue #s 1 or 2.

[75] Costs may be addressed at a case conference to be arranged.

CULLITY J.

Released: July 6, 2004

COURT FILE NO.:
DATE: 20040706

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

AHMAD SERHAN, DECEASED, BY HIS TRUSTEE WITHOUT A WILL, ZEIN AHMAD SERHAN AND BEVERLEY GAGNON

Moving Parties/Plaintiffs

- and -

JOHNSON & JOHNSON, LIFESCAN CANADA LTD. AND LIFESCAN INC.

Respondents/Defendants

REASONS FOR DECISION

CULLITY J.

Released: July 6, 2004