A WISE DEVELOPMENT? THE GROWING TREND TOWARDS SUMMARY JUDGMENT IN CLASS ACTIONS

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INTRODUCTION

In a previous article published in 2015,[1] we observed that summary judgment motions in class proceedings were historically rare, particularly before certification. We argued that the Supreme Court's refusal to raise the standard of proof for certification in *Pro-Sys Consultants Ltd. v. Microsoft*,[2] combined with the "culture shift" mandated by *Hryniak v. Mauldin*,[3] provided cause for counsel and the judiciary to reconsider the use of summary judgment motions in class actions. The recent decision of Justice Perell in *Wise v. Abbott Laboratories, Ltd.*[4] confirms that this culture shift has now arrived. Drawing on our experience as defence counsel in *Wise*,[5] the first Canadian pharmaceutical class action to be dismissed on a merits-based summary judgment motion before certification, we argue that summary judgment can be a useful and effective tool for the early resolution of certain class proceedings. We also review some of the main advantages and disadvantages of summary judgment motions that class and defence counsel should consider.

BACKGROUND

As discussed in our previous article, early decisions indicated a judicial preference for certification as the first major motion in class proceedings. Many of these decisions[6] relied on the so-called "rule"

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1. "Summary Judgment Prior to Certification in Class Actions: How *Microsoft* and *Hryniak* Have Changed the Landscape" (2015), 44 Adv. Q. 229.
2. 2013 SCC 57, [2013] 3 S.C.R. 477, 364 D.L.R. (4th) 573 (S.C.C.) (*Microsoft*).
3. 2014 SCC 7, [2014] 1 S.C.R. 87, 366 D.L.R. (4th) 641 (S.C.C.) (*Hryniak*).
4. 2016 ONSC 7275, 34 C.C.L.T. (4th) 25, [2016] O.J. No. 6100 (Ont. S.C.J.) (*Wise*).
5. Neil Finkelstein, Brandon Kain, Byron Shaw and Breanna Needham were counsel to the defendants in *Wise*.
6. See *e.g. Moyes v. Fortune Financial Corp.* (2001), 13 C.P.C. (5th) 147, 109 A.C.W.S. (3d) 556, [2001] O.J. No. 4455 (Ont. S.C.J.) at paras. 8-9, additional reasons (2001), 110 A.C.W.S. (3d) 25, 2001 CarswellOnt 4220

in s. 2(3) of the *Class Proceedings Act, 1992* (the "*CPA*") – "although honoured more often in the breach"[7] – that the certification motion shall be made within 90 days of the delivery, or expiry of the deadline for delivery, of the last Statement of Defence.[8] While this has never been a bar to summary judgment motions in class actions, their use was relatively rare, and case management judges frequently ruled that summary judgment should be heard after or at the same time as the certification motion.[9]

In *Microsoft*,[10] the Supreme Court affirmed its ruling in *Hollick v. Metropolitan Toronto (Municipality)*[11] that the criteria for certification in s. 5(1)(b)-(e) of the *CPA* only require "some basis in fact". The court declined Microsoft's invitation to raise the standard of proof to a balance of probabilities in line with the American approach.[12] While emphasizing that certification requires more than a "superficial level of analysis into the sufficiency of the evidence" amounting to "symbolic scrutiny", the court observed that certification "does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or the strength of the action".[13]

However, just one year after *Microsoft* was decided, the Supreme Court breathed new life into rule 20 in *Hryniak*,[14] calling for a "culture shift"[15] through increased use of summary judgment, an "alternative model of adjudication" that can be "no less legitimate than the conventional trial".[16] While *Hryniak* was not a class action,

(*Moyes*); *Attis v. Canada (Minister of Health)* (2005), 28 C.P.C. (6th) 209, 75 O.R. (3d) 302, [2005] O.J. No. 1337 (Ont. S.C.J.) at para. 7 (*Attis*); *Baxter v. Canada (Attorney General)* (2005), 139 A.C.W.S. (3d) 627, [2005] O.T.C. 391, [2005] O.J. No. 2165 (Ont. S.C.J.) at para. 9 (*Baxter*); *Martin v. AstraZeneca Pharmaceuticals PLC* (2009), 83 C.P.C. (6th) 79, 180 A.C.W.S. (3d) 378, [2009] O.J. No. 3847 (Ont. S.C.J.), leave to appeal refused (2009), 259 O.A.C. 155, 182 A.C.W.S. (3d) 847, [2009] O.J. No. 5265 (Ont. Div. Ct.) at paras. 13-14 (*AstraZeneca*).

7. *McCracken v. Canadian National Railway*, 2012 ONCA 445, 111 O.R. (3d) 745, [2012] O.J. No. 2884 (Ont. C.A.) at para. 76, additional reasons 2012 ONCA 797, 5 C.C.E.L. (4th) 327, 225 A.C.W.S. (3d) 629.
8. *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 2(3).
9. See the examples given in Finkelstein, Block, Kain and Shaw, *supra*, footnote 1 at pp. 235-37.
10. *Supra*, footnote 2.
11. 2001 SCC 68, [2001] 3 S.C.R. 158, 205 D.L.R. (4th) 19 (S.C.C.) at para. 25 (*Hollick*).
12. *Supra*, footnote 2 at paras. 101-102.
13. *Ibid.*, at paras. 102-103.
14. *Supra*, footnote 3.
15. *Ibid.*, at paras. 2 and 32.
16. *Ibid.*, at para. 27.

its principles are of general application, and it did not take long for the court's new "culture shift" to arrive in the world of class actions jurisprudence.[17]

THE WISE CASE

The decision in *Wise* demonstrates that summary judgment can be a useful and effective tool for the early resolution of class actions on their merits, even in cases involving a voluminous and complex record. In our view, the cases most amenable to summary judgment are those which, like *Wise*, are capable of deciding all or substantially all of the claims through the adjudication of a discrete, controlling issue.

In *Wise*,[18] the plaintiffs brought a proposed national class action on behalf of: (i) all Canadian men who were prescribed and used a topical testosterone gel medication from 2002 onward; and (ii) their dependents entitled to advance derivative claims under provincial legislation. The primary focus of the plaintiffs' claim was recovery for personal injury, on the theory that the medicine caused serious cardiovascular events such as heart attack, stroke, blood clots and death, which class members were allegedly not warned about. The plaintiffs also sought recovery for pure economic losses based on allegations the medicine was sold by the defendants outside its indicated uses and had no benefits for a subpopulation of the men to which it was prescribed. They framed their claims in negligent design, failure to warn, negligent marketing, unjust enrichment and waiver of tort.

The defendants moved for summary judgment before certification. Previously, the parties had agreed to a timetable permitting the defendants' summary judgment motion to be heard and determined prior to certification. However, at the motion, the plaintiffs took the position – described by the court as "Trumpian"[19] – that the case was *not* appropriate for summary judgment for the *defendants*, but that it *was* appropriate for partial summary judgment for the *plaintiffs*.

17. See *e.g. Player Estate v. Janssen-Ortho Inc.*, 2014 BCSC 1122, 11 C.C.L.T. (4th) 104, [2014] B.C.J. No. 2123 (B.C. S.C.) (ruling that a class action against defendants who manufactured, marketed and distributed fentanyl patches was appropriate for a summary trial in B.C.); *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108, 371 D.L.R. (4th) 339, 56 C.P.C. (7th) 107 (Alta. C.A.) (dismissing an appeal from a summary judgment motion in a class proceeding, based in part on the "culture shift" mandated by *Hryniak*).
18. *Supra*, footnote 5.
19. *Ibid.*, at para. 334.

Justice Perell granted the defendants' motion and dismissed the action. Relying on *Hryniak*,[20] he concluded that the motion was appropriate for summary judgment notwithstanding the volume and complexity of the record. He observed that the parties had "filed more than 11,000 pages in materials for the summary judgment motion, including affidavits and exhibits and transcripts (approximately 7,200 pages), factums (292 pages) and case authorities (4,025 pages)" and that there were six days of oral argument.[21] However, the motion judge concluded that he could justly and fairly decide the matter on the record before him using the forensic tools available under the expanded rule 20 powers.[22]

The defendants focused on a single issue capable of disposing of the entire action: general causation. Largely for this reason, they were able to convince the motion judge that summary judgment was appropriate and should be granted in their favour.

The motion judge found that there was a "genuine issue about causation" in the "immediate case", but that it was possible to resolve this issue using the enhanced fact-finding powers under rules 20.04(2.1) and (2.2). Having regard to all the evidence, the plaintiffs could not demonstrate on a balance of probabilities that the drug can cause serious cardiovascular events.[23] There was accordingly no genuine issue requiring a trial on general causation, a "constituent element" of all the plaintiffs' negligence claims.[24]

The defendants' focus on general causation allowed the court to conclude that summary judgment was appropriate and could be granted on the personal injury claims, without the court having to wade deeply into other issues such as the duty of care and standard of care from the date of drug approval:

> In my opinion, the case at bar is an appropriate case for a summary judgment. There is no doubt that I have sufficient evidence on all relevant points to allow me to make dispositive findings and both sides have put forward sufficient evidence to make their respective arguments about the dispositive issues. Although there was a voluminous amount of evidence, I am satisfied that I can justly and fairly decide the matter without the advantages of participating in the dynamic of a trial. The adjudicative process of reviewing and studying the evidence might have been less demanding for the adjudicator if stretched out over a trial, but a trial adjudicator would also have had also to address not only general

20. *Supra*, footnote 4.
21. *Ibid.*, at para. 9.
22. *Ibid.*, at paras. 321-36.
23. *Ibid.*, at para. 347.
24. *Ibid.*, at paras. 14.

> causation but also some very difficult duty of care and standard of care issues and ultimately the trial judge would be left to explore and analyze the expert's material outside of the courtroom in the same way that I have.
>
> Having regard to the litigation as a whole, dealing with the matter of general causation is efficient and proportionate, and while the Wises wished to hedge with the argument that a summary judgment would be appropriate only for them, this hedging belies the notion that it would not be in the interests of justice to decide the issue of general causation immediately one way or the other.[25]

In *obiter*, the motion judge suggested that a manufacturer might have a duty to warn about a risk in the absence of proof of causation. However, this was ultimately irrelevant to the result in the case, since the lack of general causation made it unnecessary to decide whether such a duty was breached by the defendants:

> Whether the duty to warn had been breached . . . would involve more analysis of the standard of care and more analysis of the adequacy of the warnings . . . included in [the] product monographs as they changed from time to time. On this summary judgment motion, the evidence and the analysis did not go that far, although the trend of the evidence, which showed compliance to regulatory standards, tended to favour [the defendants'] position that [the] warnings were adequate having regard to the state of knowledge from time to time. However, I repeat that I make no finding one way or the other about whether the duty to warn was breached in the immediate case.
>
> The primary reason that the Wises' failure to warn claim must fail is, assuming a breach of the standard of care, they failed to prove general causation. A failure to warn that causes no harm is not culpable negligence.
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> . . . . .
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> No harm, no foul; causation is a constituent element of the Wises' negligence claim, be it a duty to warn claim or a negligent design claim, and there is no genuine issue requiring a trial about general causation. It follows that the negligence claims should be summarily dismissed.[26]

The motion judge also held that the plaintiffs' claims for pure economic loss failed on the facts, since the plaintiffs had not proven that Mr. Wise had purchased a "useless product".[27] In addition, and as with the personal injury claims, the pure economic loss claims were legally untenable in the absence of proof of general causation,

25. *Ibid.*, at paras. 335-36.
26. *Ibid.*, at paras. 378-79 and 382.
27. *Ibid.*, at para. 392.

since they did not fall into any of the recognized exceptions allowing recovery for pure economic loss in the absence of physical or property harm.[28]

CONSIDERATIONS FOR COUNSEL

The *Wise* case illustrates that summary judgment can be a useful alternative to the conventional certification motion followed by a common issues trial, even in cases involving a complex and voluminous record. We suggest that summary judgment should be increasingly considered in class actions, particularly in cases that center around a discrete issue, which, if adjudicated, will resolve all or substantially all claims in the litigation. Pharmaceutical class actions, with their traditional focus upon the question of general causation, may be well suited to this procedure in certain cases. Other types of class actions may be appropriate to summary judgment as well, *e.g.*, securities claims which revolve around whether an alleged misrepresentation was made, or antitrust claims which turn on whether there was an anti-competitive agreement.

The potential advantages of summary judgment in class actions are similar to the advantages in any other action, though they involve an even greater potential savings in time and expense given the potential to avoid or limit what is often an all-consuming certification process. It is true that the summary judgment motion in *Wise* involved a voluminous record and considerable time and effort on both sides. However, even with several contested adjournments of the hearing, the entire motion was heard in a one-week period just over two years after the action was commenced, and the decision was released just two months after the hearing. This was far shorter and more focused than a common issues trial would have been. For instance, in *Andersen v. St. Jude Medical, Inc.*,[29] Lax J. presided over a common issues trial involving allegations of defective heart valves which stretched from February 2010 to September 2011, necessitating a further lengthy reserve period of nearly one year for the decision. Another comparison may be drawn to *Rothwell v. Raes*,[30]

28. *Ibid.*, at paras. 394-401.
29. 2012 ONSC 3660, 219 A.C.W.S. (3d) 725, [2012] O.J. No. 2921 (Ont. S.C.J.).
30. (1988), 54 D.L.R. (4th) 193, 66 O.R. (2d) 449, 12 A.C.W.S. (3d) 231 (Ont. H.C.), additional reasons (1989), 59 D.L.R. (4th) 319, 69 O.R. (2d) 62, 15 A.C.W.S. (3d) 382, affirmed (1990), 76 D.L.R. (4th) 280, 2 O.R. (3d) 332, [1990] O.J. No. 2298 (Ont. C.A.), leave to appeal refused [1991] 1 S.C.R. xiii, 79 D.L.R. (4th) vii, 2 O.R. (3d) xii (S.C.C.). See also: *Baghbanbashi v. Hassle Free Clinic*, 2014 ONSC 5934, 245 A.C.W.S. (3d) 813, [2014] O.J. No. 4853 (Ont. S.C.J.) at para. 20.

in which a product liability claim by a single plaintiff was dismissed for want of general causation after 74 days of evidence. By hearing an early summary judgment motion focused upon general causation in *Wise*, Justice Perell permitted the savings of considerable time and expense for both the parties and the justice system.

Counsel should also be cognizant of the timing of a summary judgment motion in class actions. Technically, a decision before certification such as *Wise* resolves the claims of the representative plaintiffs only. However, the practical effect of a summary judgment motion that decides a constituent element of a class action is no different where the motion is brought before certification versus after. In *Wise*, for instance, future litigation involving the same or similar allegations by a different representative plaintiff would be dismissed under the doctrine of abuse of process by relitigation.[31]

Potential disadvantages of moving for summary judgment include the "blowback" risk of summary judgment in favour of the respondent. It is now well established that summary judgment may be granted in favour of the respondent, even in the absence of a cross-motion.[32] Of course, this "blowback" risk will have to be assessed by the moving party based on the evidence in each case. Furthermore, there is always risk that the court will conclude that it is not in the interest of justice to decide the case summarily, giving rise to wasted time and expense. However, this risk is lower where the parties agree to summary judgment,[33] or where the case centers on a discrete issue capable of resolving all or substantially all issues in the litigation.[34]

31. *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64 (S.C.C.) at paras. 35-55. See also *Bear v. Merck Frosst Canada & Co.*, 2011 SKCA 152, 345 D.L.R. (4th) 152, [2012] 6 W.W.R. 1 (Sask. C.A.).

32. See e.g. *Wilson v. Scotia Mortgage Corp.*, 2016 ONSC 7000, 273 A.C.W.S. (3d) 398, [2016] O.J. No. 581 (Ont. S.C.J.) at para. 34, additional reasons 2016 ONSC 8106, 63 C.C.L.I. (5th) 325, 275 A.C.W.S. (3d) 387, additional reasons 2017 ONSC 1315, 276 A.C.W.S. (3d) 288, 2017 CarswellOnt 2714; *Gebara v. Economical Insurance Group*, 2017 ONSC 801, 276 A.C.W.S. (3d) 921, [2017] O.J. No. 458 (Ont. S.C.J.) at para. 45; *King Lofts Toronto I Ltd. v. Emmons*, 2013 ONSC 6113, 40 R.P.R. (5th) 1, [2013] O.J. No. 4418 (Ont. S.C.J.) at para. 86, additional reasons 2013 ONSC 7444, 40 R.P.R. (5th) 23, 234 A.C.W.S. (3d) 557, affirmed 2014 ONCA 215, 40 R.P.R. (5th) 26, [2014] O.J. No. 1333 (Ont. C.A.); *S.G. Investments Group Ltd. v. Avison Young Commercial Real Estate (Ontario) Inc.*, 2016 ONSC 2272, 71 R.P.R. (5th) 153, 265 A.C.W.S. (3d) 6 (Ont. S.C.J.) at para. 63.

33. See e.g. *Brown v. Canada (Attorney General)*, 2017 ONSC 251, 275 A.C.W.S. (3d) 676, [2017] O.J. No. 692 (Ont. S.C.J.); *Bakshi v. Global Credit & Collection Inc.*, 2016 ONSC 4610, 273 A.C.W.S. (3d) 98, [2016] O.J. No. 5776 (Ont. S.C.J.), additional reasons 2016 ONSC 8095, 275 A.C.W.S. (3d) 503, 2016 CarswellOnt 20545.

Finally, defendants should be aware that moving for summary judgment before or at the same time as certification may make certification easier for the plaintiff. A focus on a discrete issue may help the defendant convince the court that summary judgment is appropriate. However, the plaintiff may argue that the presence of a discrete issue demonstrates there are common issues which will advance the litigation, making a class action the preferable procedure.[35] While the risk of assisting the plaintiff on certification cannot be dismissed, the reality is that certain class actions have a high likelihood of being certified in any event, and judges appear to be increasingly receptive to merits-based summary judgment motions as an alternative to the traditional model of class actions involving long, protracted and expensive certification hearings. In each case, counsel will have to make a careful tactical decision about how best to proceed.

CONCLUSION

The decisions in *Microsoft* and *Hryniak* are converging to make summary judgment more common and, in some cases, more attractive in class actions. We anticipate that this "culture shift" will continue to influence class actions jurisprudence and that pre-certification summary judgment motions will become more common. Our experience suggests that summary judgment can be an effective tool for the early resolution of certain types of class proceedings, particularly those that can be resolved through the adjudication of a discrete issue which is a constituent element of the primary claims asserted. While summary judgment may not work for every class action, there can be no doubt that in appropriate circumstances the procedure reduces litigation costs, frees judicial resources and produces time-savings for all the parties involved. By any measure, this a "*Wise*" development for the Canadian legal system.

34. *Wise*, *supra*, footnote 4.
35. *Wise*, *supra*, footnote 4 at para. 314.