

COURT FILE NO.: 06-CV-307254CP

DATE: 20080124

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KEVAN DRADY

Plaintiff

- and -

THE ATTORNEY GENERAL FOR CANADA

Defendant

- and -

BAXTER HEALTHCARE CORPORATION,  
BAXTER INTERNATIONAL INC.,  
INAMED LLC, DOW CORNING  
CORPORATION, DCC LITIGATION  
FACILITY INC., MEDTRONIC XOMED  
SURGICAL PRODUCTS  
INCORPORATED, SMITHS MEDICAL  
CANADA LTD., BRISTOL MYERS  
SQUIBB COMPANY, RELIGIOUS  
HOSPITALLERS OF ST. JOSEPH OF THE  
HOTEL DIEU OF KINGSTON and DR. A.K.  
WYLIE

Third Parties

)  
)  
) *Kirk Baert, John Legge and Celeste Poltak,*  
) *for the Plaintiff*  
)  
)  
) *James Soldatich, Adam Rambert, Karen*  
) *Watt, Sadian Campbell and Susan Keenan,*  
) *for the Defendant*  
)  
)  
)  
) *Mirilyn Sharp, for Baxter Healthcare*  
) *Corporation and Baxter International Inc.*  
)  
) *Robby Bernstein, for Smiths Medical*  
) *Canada Inc.*  
)  
) *Patrick Hawkins, for Religious Hospitallers*  
) *of St. Joseph of the Hotel Dieu of Kingston*  
)  
) *Laura F. Cooper, for Bristol Myers Squibb*  
) *Company*  
)  
) *Gillian Slaughter, for Dr. A.K. Wylie*  
)  
) *S. Wayne Morris and Gillian Eckler, for*  
) *Dow Corning Corporation and DCC*  
) *Litigation Facility Inc.*  
)  
) *Patricia Latimer, for Inamed LLC*  
)  
) *Patrick O'Kelly, for Medtronic Xomed*  
) *Surgical Products Incorporated*  
)  
)  
) **HEARD: June 26, 27, 28 and 29, 2007**

COURT FILE NO.: 99-CV-181819CP

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KATHRYN ANNE TAYLOR

Plaintiff

- and -

THE ATTORNEY GENERAL FOR CANADA

Defendant

- and -

UNIVERSITY HEALTH NETWORK (Formerly, Toronto General Hospital), and DR. W. DOBROVOLSKY

Third Parties

)  
)  
) Kirk Baert, John Legge and Celeste Poltak,  
) for the Plaintiff  
)  
)  
)  
) James Soldatich, Adam Rambert, Karen  
) Watt, Sadian Campbell and Susan Keenan,  
) for the Defendant  
)  
)  
)  
) Patrick Hawkins, for University Health  
) Network  
)  
) Margaret Waddell, for Dr. W. Dobrovolsky  
)  
) HEARD: June 26, 2007

Proceeding under *The Class Proceedings Act, 1992*

DECISIONS ON COSTS

CULLITY J.

[1] Counsel have now made written submissions on the costs of four motions in Drady, and one in Taylor, that were heard seriatim on June 26 through June 29, 2007. As I will indicate, the task of awarding, and fixing the costs, is not without difficulty.

[2] The motions and the decisions released on July 16, 2007 were as follows:

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1. a motion to strike the third party claims in Drady and Taylor on the ground that the Crown could have no right to contribution or indemnity (the "Several Liability motion"). Dismissed;
2. motions by the Crown and the third parties to strike the statement of claim – and, in the case of the third parties, the third party claims - in Drady on the basis of the Ragoonanan principle (the "Ragoonanan motions"). Granted;
3. the plaintiff's motion to stay or sever the third party proceedings in Drady (the "Stay motion"). No disposition; and
4. the Attorney General's motion to strike the claim in Drady for failure to disclose a reasonable cause of action, independently of the Ragoonanan principle (the "Rule 21 motion"). Granted.

[3] I will consider, first, the parties who are entitled to costs, and those who should pay them, in respect of each of the motions. I will then address the claims of third parties for their costs of this action and the previous Drady/Taylor action. Lastly, I will deal with the amounts to be paid.

#### 1. The Several Liability motion

[4] The Attorney General was successful in responding to this motion and, *prima facie*, is entitled to a partial indemnity for his costs. Counsel for the Attorney General submitted that these costs should be paid by the third parties in both the Taylor and the Drady actions. Counsel for the third parties in Drady were unanimous in resisting the attempt to cast the burden of the costs on their clients. All but one of them submitted that the plaintiffs should pay their costs and those of the Attorney General. Counsel for the other third party agreed that any order to pay costs should be made against the plaintiff but suggested that it would be preferable to deny costs. Counsel for the third parties in Taylor submitted that there should be no order against her clients or only an order for a minimal amount, and that it should, possibly, be payable in the cause.

[5] One of the arguments advanced in favour of a denial of costs was that the third parties should not have been brought into the proceeding before the Attorney General had brought the Rule 21 motion and his Ragoonanan motion. This argument was a continuing refrain in the third parties' submissions with respect to their costs of the two actions. I am not persuaded by it.

[6] The third party claims in the Drady action were made within the statutory period of 10 days after the statement of defence was delivered. The defendant had been directed to deliver his defence by Winkler J. at a case conference held on September 25, 2006. Counsel for the Attorney General had referred to the requirement to issue any third party claim within 10 days and had requested leave to defer doing this until after certification. Winkler J. was not prepared to give leave for this purpose and indicated that motions to strike in Drady could precede certification - a position for which counsel for the third parties had been vigorously contending throughout the conference and at earlier conferences. Counsel for the Attorney General then indicated that he would deliver the statement of defence to the Drady action and, within a further 10 days, the third party claims. In these circumstances, I am not impressed with the suggestion

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that the defendant should now be criticized and denied costs because he did not revive in some way the requests for leave to defer issuing the third party claim. Nor am I at all convinced that, if he had obtained leave and then proceeded with the Ragoonanan motion and that under Rule 21, the putative third parties would not have sought leave to participate in the motion as some of them had done in *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.).

[7] As far as I am able to ascertain, the possibility of several liability that would exclude any right of contribution was first raised by Winkler J. at a case conference on April 18, 2005. The learned judge indicated that the pleading in the Drady/Taylor action would need to be amended for this purpose but that this should not be difficult. He commented, however, that if the Attorney General was of the opinion that it did not satisfactorily achieve its purpose, the question would have to be decided by the court. That is what occurred.

[8] I dismissed the motion on the ground that the statement of claim was ambiguous to an extent that made it reasonable and prudent for the defendant to conclude that, if he was found liable in damages, there might well be a right to contribution from the third parties. The ambiguity arose because, despite the statement at the end of the pleading that the claim was for the "several liability" of the Crown, it is clear that the plaintiff was claiming the full amount of the damages he suffered. In these circumstances, the Crown would, *prima facie*, have a right to contribution pursuant to section 1 of the *Negligence Act*, R.S.O. 1990, c. N. 1 (as amended), if, to any extent, those damages were caused, or contributed to, by the fault or neglect of third parties. I did not think that the simple reference to several liability at the end of the pleading was sufficient to indicate that the plaintiff's claim was only for the part of the damages that was proportionate to the degree of fault or neglect of the Crown relative to that of any other person who contributed causally to the plaintiff's damages.

[9] I held that, for the purposes of the motion, the important consideration was not the expectation of the third parties, but the meaning that the pleading reasonably conveyed to the defendant. I accepted the submission of counsel for the Attorney General that it was not plain and obvious from its contents that there could be no right to contribution. Nor was I satisfied that the discussions at a case conference on which counsel for the third parties relied indicated that counsel for all parties were sufficiently *ad idem* on the intended meaning to permit the ambiguity to be resolved in favour of the position of the third parties and against that advanced by the Attorney General at the hearing.

[10] For the purpose of considering counsel's submissions on costs, I have been able to review the transcripts of each of the case conferences in April and October 2005 and March and September 2006. While they indicate that the third parties consistently argued that the short reference to several liability in the final paragraph of successive drafts of the amended statement of claim was effective to exclude any possible right to contribution, counsel for the Attorney-General was just as clearly of the opinion that it did not do so. He understood the reference to have its traditional meaning that merely distinguishes several liability from joint liability and that continued to be the position of the Attorney General at the hearing. The third parties, on the other hand, attributed to the notion of several liability a meaning that has been increasingly adopted in the more recent cases – a shorthand indication that the damages claimed were limited to those

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which were proportionate to the relative degree of fault to be attributed to the conduct of the defendant. On that interpretation, there would be no right to contribution or indemnity from any other joint tortfeasor. While one of plaintiffs' counsel thought the reference to several liability limited the liability of the Crown to damages caused by its own default or neglect, another denied that it imposed any limitation. Both at the case conferences and, initially, at the hearing, he was adamantly opposed to any suggestion that their claims were for anything less than the full amount of the damages suffered by the plaintiffs in Drady/Taylor and, subsequently, those of the plaintiff in Drady. In his opinion, the reference to several liability added nothing of significance and, to this extent, his interpretation was consistent with that of counsel for the Attorney General.

[11] The nature of these disagreements was apparent - or should have been apparent - to all counsel at the conferences held to consider the effect of amendments to the statement of claim in Drady/Taylor. Unfortunately, this ground for discontinuing the third party claims received little attention relative to that given to the alternative grounds based on the Ragoonanan principle and the consequences of removing the generic silastic claims from the pleading. No attempt to resolve the conflict between the different interpretations was made at the conferences.

[12] If the issue had received adequate attention, it would have been a relatively simple matter for the pleading to be amended to remove the ambiguity and, without prejudice to the interests of any of the parties - and as Winkler J. had suggested - to limit the claims against the Crown for damages for which it would have no right to contribution. All that was required was to clarify what the reference to several liability was intended to convey. There was no reason why the Attorney General should not have accepted the meaning that the third parties wished to attribute to the pleading if this had been stated clearly and unambiguously. If that had been done, there would have been no basis on which any of the third party claims could have been upheld, the Crown's potential liability would have been limited, and the Several Liability motions - and the third parties' Ragoonanan motions - would have been unnecessary.

[13] The case management system is intended to facilitate the efficient and orderly progress of proceedings. Among other things, it attempts to prevent them from being disrupted, and time and expense wasted, by unnecessary motions. The issue here was of a kind that the system was perfectly adequate to resolve. It could, and should, have been dealt with satisfactorily without prejudice to the interests of any of the parties and without recourse to the court.

[14] For that reason, I have considered whether the costs of the Several Liability motions - and the third parties' costs in the Ragoonanan motions - in the Drady action should be denied. I would be inclined to do this if I was satisfied that I had the full story of the discussions among counsel. However, I do not know whether the possibility of further amendments to the statement of claim was ignored by all parties, or whether it was, for example, discussed and resisted by plaintiffs' counsel, whether counsel for the Attorney General had indicated that amendments would not solve the problem, or whether the third parties had insisted that amendments were unnecessary. In these circumstances, I believe the appropriate exercise of the discretion under section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 is to deal with the costs of the motions without attributing weight to the failure to resolve the issues out of court, or responsibility for such failure to any one, or more, or all, of the parties. On that basis, the

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Attorney General was entitled to resist the Several Liability motion, was able to do that successfully, and is entitled to an order for his costs.

[15] I am not prepared to accept the submissions of the third parties' counsel that, in the event of such an order, the costs of the Several Liability motion should be paid by the plaintiff. It is based on the ground that responsibility for any ambiguity in the statement of claim was that of the plaintiff. The motion made by the third parties turned on the interpretation of the words in the statement of claim in the Drady action that had been considered by all counsel for the purposes of the Drady/Taylor proceeding. The fact that the interpretation I have placed on them is not consistent with the expectations of the third parties is not, in my opinion, a sufficient reason for penalising Mr Drady by making him pay the costs of the third parties' motions. In my judgment, the third parties should pay the costs of the defendant in respect of the Several Liability motion and there should be no order in respect of their costs.

[16] There will be no costs of the Taylor motion as the Attorney General had refused a reasonable request of counsel for the third parties in that action to have the decision in the Drady motion determinative of that in Taylor. As I have indicated, the pleading and the issues were materially identical in the two cases.

## 2. The Ragoonanan motions

[17] The Attorney General succeeded in obtaining an order to strike the statement of claim on the basis of the Ragoonanan principle. The third parties were likewise successful on their joint motion for the same relief and, in consequence, the third party claims for contribution were struck.

[18] If the motions to strike the statement of claims had been denied, it is my understanding that the third parties would have submitted that the third party claim should still be struck on the ground that no factual connection between Mr. Drady's injuries and the particular products manufactured by any of them had been identified in either pleading. In view of the conclusion I reached on the motion to strike the statement of claim in its entirety, it was unnecessary to deal with this alternative argument in respect of the third party claims and I did not do so.

[19] Apart from any special considerations arising from the fact that the action was commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA") - which I will refer to separately below - the Attorney General is, in my opinion, entitled to have its partial indemnity costs of the motion paid by the plaintiff.

[20] In my opinion, the third parties are also entitled to an order for the costs of the motion. Although the part of the motion on which they were successful in obtaining an order to strike the third party claims was duplicative of that of the Attorney General, counsel for the third parties largely restricted their submissions to the grounds for striking the third party claims even if the Attorney General's motion to strike the pleading was unsuccessful. There was therefore no unnecessary duplication and the third parties were ultimately successful in obtaining an order to strike the third party claims.

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[21] Where an action has been dismissed the general rule is that costs awarded to a third party should be paid by the defendant. The reason for the rule was explained by McLachlin J. (as she then was) in *Milina v. Bartsch et al* (1985), 63 B.C.L.R. 122 (B.C.S.C.), at paras 9-10, as follows:

The award of costs is in the discretion of the court. That discretion is to be exercised in accordance with the rules of practice and the particular circumstances of the case.

The normal rule is that a plaintiff who was unsuccessful against a defendant will not be charged with the costs of the third party. The plaintiff did not sue the third party, did not want him in the case and was not responsible for joining him. In these circumstances it has been thought to be unfair to visit the third party's costs on the plaintiff: ...

There may be situations where on the peculiar facts of the case, fairness requires an unsuccessful plaintiff bear a successful third party's costs. Courts have held that such an order may be appropriate where one or more of the following situations was present:

... 4. Where the third party proceedings follow naturally and inevitably upon the institution of plaintiff's action, in the sense that the defendant had no real alternative but to join the third party: *Credit Foncier Franco-Can. v. Bennett* (1964), 47 W.W.R 369.

[22] The learned judge's comments on the normal rule are particularly applicable to this case where plaintiff's counsel were opposed to the inclusion of the third parties and concerned that it would complicate enormously the process towards certification and a trial of common issues under the CPA.

[23] In *Nichols v. Koch Oil Co.*, [2000] B.C.J. No. 1942 (B.C. S.C.), Koenigsberg J. rejected the submission that the statements in *Milina* unduly interfere with the discretion of the court in awarding costs. He stated (at para 14):

Counsel for Koch submitted that there are no absolute rules such as those set out above in *Milina*. I do not agree that *Milina* sets out absolute rules. Nor is what is posited as the normal rule wrong. There is little question that at least as at 1985, the normal rule of practice as set out in the Rules of Practice, was that a plaintiff who is unsuccessful against the defendant will not be charged with the costs of a third party. Such a rule is obvious unless there are circumstances which would compel a different result in order to achieve fairness. The four examples of such circumstances as set out in *Milina* are, in my view very broad, but are not exclusive.

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They are merely illustrations of situations in which Courts up to that time had awarded third party costs against plaintiffs.

[24] In this case, I believe the 4th of the exceptions identified by McLachlin J. is applicable. The plaintiff claimed against the defendant for all the damages he had allegedly suffered from the defendant's failure to regulate dangerous products manufactured by the third parties. The latter would have been inevitably involved in the proceeding to the extent at least of providing witnesses and the defendant would very likely have requested, and obtained, orders for discovery of them. Irrespective of the plaintiff's position that, because of the nature of their claim for regulatory negligence, there could be no right to contribution, the novelty of the claim and the words of the pleading made it virtually inevitable that the defendant would want to join the manufacturers of the generic products as third parties.

[25] In my opinion, this is a case in which the costs of the third parties in the Ragoonanan motions should be paid by the plaintiff.

[26] Finally, I note that, although I did not refer to the submissions of plaintiff's counsel that the third parties had no standing to bring their Ragoonanan motions before delivering a statement of defence in the main action, I implicitly rejected it. The short answer is that they were given leave to bring the motion by the case management judge. Leave to defer filing statements of defence is very commonly granted in class proceedings. The decision in *Van Patten v. Tillsonberg District Memorial Hospital* (1999), 45 O.R. (3d) 223 (C.A.) on which plaintiff's counsel relied has, in my opinion, no bearing on the question of standing in this case. It concerned a motion for summary judgment to which rule 20.01 (3) applies. [I believe paragraph 34 of the judgment contains a typographical error in that it refers to rule 21.01 (3).]

### 3. The motion to stay

[27] In view of my decision to strike the statement of claim, the issues on this motion were moot and I did not decide them. Although, strictly, the motion might - and, perhaps, should - have been dismissed, I indicated that I would have granted a partial stay if it had been necessary to make a decision. There will be no order for the costs of this motion.

### 4. The Rule 21 motion

[28] Although, as with the Ragoonanan motion, the Attorney General succeeded in striking the statement of claim in its entirety, this motion was argued separately. The motion was granted on the ground that the pleading disclosed no reasonable cause of action in respect of the claims for negligence, breach of fiduciary duty and Charter violations. I see no reason why, apart from considerations arising under the CPA, the Attorney General should not be entitled to a partial indemnity for his costs of the motion.

### 5. The third parties' costs of the Drady action.

[29] The third parties seek their costs of the action over and above their costs of the Several Liability and Ragoonanan motions. I will make such an order as the third party claims have been

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dismissed and as I see no reason why costs should not follow the event. My reason for ordering the costs of the Ragoonanan motion to be paid by the plaintiff apply equally to these costs and there will be an order accordingly.

#### 6. Costs of the Drady/Taylor action

[30] On a motion decided on February 13, 2003, this court allowed the original plaintiff, Judith Logan, to withdraw from the proceeding and to be replaced by Kevan Drady and Kathryn Taylor. The decision was upheld by the Court of Appeal in *Logan v. Canada (Minister of Health)* (2004), 71 O. R. (3d) 451. The amended statement of claim to be delivered pursuant to the order contained product specific claims in respect of devices of the Vitek proprietary type and generic claims relating to devices made of silastic material. Ms Taylor had been implanted with the former; Mr Drady's claims related to the latter.

[31] Following the decision of the Court of Appeal, the Attorney General delivered third party claims for contribution and indemnity against manufacturers of the generic silastic devices and hospitals and physicians who allegedly were involved with their implantation.

[32] At the case conference on April 15, 2005, the third parties requested the court to schedule Ragoonanan motions in which they would challenge the validity of the claims against them on the ground that there were no allegations that either Mr Drady, or Ms Taylor, had received implants manufactured, or implanted, by them. The plaintiffs were also opposed to the inclusion of third parties in the proceeding on the ground that the nature of the claims against the Crown precluded any possible right to contribution or indemnity. They were understandably concerned that the participation of the third parties would complicate the management and progress of the class action.

[33] At a case conference, the learned judge was of the opinion that undesirable complexity would be created by the inclusion of the generic Vitek claims in the same proceeding. The conference was adjourned to give the plaintiffs an opportunity to decide whether to confine the claims to the "several liability" of the Crown and to specific products that the proposed representative plaintiffs could prove they had received.

[34] Plaintiffs' counsel then produced a draft of a further amended statement of claim that would not include Mr Drady as a plaintiff. This draft was considered at a case conference on March 6, 2006 when objections were raised by counsel for the Attorney General and for the third parties that it continued to contain generic allegations in respect of silastic implants. Counsel for the Attorney General indicated that, if these were removed, and if the third parties did not seek an order for their costs, the Attorney General would consent to the dismissal of Mr Drady's claims on a with prejudice basis.

[35] While counsel for the third parties did not agree that a with prejudice dismissal was appropriate, they expressed concerns that, if Mr Drady was permitted to discontinue his part of the action, there would be nothing to prevent him from resurrecting his generic claims in a separate action. They invited counsel for the plaintiffs to indicate whether this would be done. Winkler J. indicated his view that a dismissal with prejudice would not be fair or appropriate and

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that, if there was a discontinuance, Mr Drady would be free to commence a separate generic action if he chose to do so. Counsel for the plaintiffs did not respond to the request to disclose Mr Drady's intention with respect to a separate action. He stated that, in view of the learned judge's comments, he did not think he was required "to do more than talk about this case". Winkler J. did not direct him to commit his client and the conference ended after the learned judge indicated that the draft pleading should be amended to remove the generic allegations that the Attorney General and the third parties considered to be objectionable. Counsel for the Attorney General agreed that, if this was done, the third party claims could be discontinued.

[36] Amendments to the draft statement of claim were then circulated among counsel. At a case conference on June 19, 2006, leave to issue an amended statement of claim was granted. At the same case conference, the Attorney General sought leave to discontinue the third party claims in Drady/Taylor against the manufacturers and others who subsequently became the third parties in a separate Drady action, but not against those who are now the third parties in the Taylor action. The retention of the latter was consistent with the views of counsel for the Attorney General on the lack of significance of the reference to several liability in the pleading. They stated that, as the third parties had indicated that they would not be seeking costs of the discontinued third party claims, the Attorney General would not ask for costs against the plaintiff. The third parties had consented to the discontinuances on a no costs basis, and Winkler J. gave leave for this purpose.

[37] Unknown to the counsel for the other parties, the separate Drady action had been commenced on March 3, 2006 when the statement of claim was issued. The effect was that the claims that had been made in the Drady/Taylor action were now to be split between the Taylor action and the new Drady action.

[38] The statement of claim in the Drady action was not served on the defendant until a few days after the case conference on June 19, 2006 and its existence was not disclosed to the other parties, or to Winkler J., on that occasion, or at the earlier case conference on March 6, 2006. Accordingly, when the defendant and the third parties did not object to – or ask for costs in respect of – the amended statement of claim in the Drady/Taylor action, and consented to the discontinuance without costs of the third party claims, they were not aware that the generic claims against the Attorney General were repeated in the new Drady action with the result that it was likely that the same third party claims would be revived. They were, however, aware – and had accepted the risk – that the claims previously asserted in Drady/Taylor might ultimately be split between Taylor and a new action by Mr Drady.

[39] By the time of the service of the statement of claim in the Drady action, a draft order granting leave to discontinue the third party claims without costs had been approved by all parties but had not been presented to Winkler J. for signing. An order permitting the Attorney General to amend the third party claims by deleting Mr Drady's name from the style of cause, and the claims against all but the two third parties who remain in the Taylor action, was signed by the learned judge and entered on September 15, 2006. The third parties consented to this order. It was agreed that the order relating specifically to the discontinuances without costs should not be presented to the learned judge until a further case conference was held at which the

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third parties intended to raise objections to the previous non-disclosure of the existence of the Drady action. Paragraphs 20 - 22 of written submissions prepared for use at the case conference on behalf of the "Baxter Third Parties" are as follows:

20. Had the Baxter Third Parties known that Plaintiffs' counsel were merely intending to "split" the Original TMJ Action into two separate actions, they would never have agreed to the proposed amendment nor the without costs discontinuances of the Third Party Claims. Rather, they would have requested the opportunity to extricate themselves completely from this litigation by bringing pre-certification Motions to Dismiss the Third Party Claims prior to the Original TMJ Action being split.

21. As a result of the Plaintiffs' counsel decision to keep this information from the Court, the Federal Government, and the Third Parties, a great deal of time, energy and costs have been wasted.

22. The Baxter Third Parties respectfully request:

(a) that they (and the other Third Parties) be entitled to bring pre-certification Motions to Dismiss the Third Party Claims, either in the context of the Original TMJ Action or in the context of the New TMJ Action;

(b) that the Court set an early date for the return of these Motions to Dismiss;

(c) that the Plaintiffs and/or their counsel be suitably sanctioned by way of an adverse costs ruling, taking into account the wasted time and costs expended by the Court, the Third Parties, and the Federal Government as a result of the Plaintiffs' failure to disclose its intention to "split" the Original TMJ Action into two actions; and

(d) that, if necessary to achieve any of the above, the without cost discontinuance order and/or any other order made in the Original TMJ Action be set aside so as to facilitate the relief now being sought.

[40] At the case conference on September 25, 2006 Winkler J. expressed surprise and concern that plaintiffs' counsel had not thought it appropriate to disclose the existence of the Drady action at the previous conference on June 19, 2006. In response to the third parties' request for costs, he stated that they could raise the question in the Drady action. The order he subsequently signed states that the discontinuances are without prejudice to the right of any of the third parties in the Drady action to "assert a claim in [that action] for their costs thrown away in respect of [the Drady/Taylor] action". It is silent with respect to the costs entitlement or liability of other parties.

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[41] The third parties have now asserted such a claim in respect of the entirety of their costs in the Drady/Taylor action. The order does not, in its terms, preclude them from doing this. Nor does it give them any entitlement to costs. As I understand it – and the relevant parts of the discussion at the case conference of September 25 – the intention was to permit the third parties to raise in the Drady action costs-related issues affected by the plaintiffs' non-disclosure of its existence. It was not intended to provide the third parties with an opportunity for "second thoughts" – to wipe the slate clean so that they would have complete freedom to reopen the question of their costs without regard to their previous decisions that had been communicated to the other parties, and any intervening steps that might have been taken by the latter.

[42] While the costs of the entire action - as distinct from those thrown away in preparing for and attending the case conferences of March, June and September 2006 - were mentioned at the conference in September, the only claims for costs specifically asserted were for those referred to in the written submission - in effect, the costs of the wasted case conferences. The third parties' costs of the action were mentioned only as costs they could, it was said, have claimed against the Crown if, instead of agreeing to a discontinuance of the third party claims without costs, they had proceeded with a motion to strike the claims. To this Winkler J. is reported to have responded:

... I think that as far as the cost opportunity, we are not going to get any cost from there.

[43] In these circumstances, I see no ground on which the Crown should be required now to pay the third parties' costs of the Drady/Taylor action. The Attorney General had not sought costs of the discontinuance of Drady's claims against him pursuant to rule 23.05 in the course of the earlier case conference in which leave had been granted to amend the statement of claim to remove Drady as a plaintiff. In doing so, he had relied on the agreement of the third parties to the discontinuance of his claims against them without costs. Leave had subsequently been granted for the Drady third parties to be deleted from the third party claims. The failure of plaintiffs' counsel to disclose the existence of the Drady action should not have the effect of subjecting the Attorney General to an order for the costs of the third parties for which he would not otherwise have been liable, and for which he had abandoned a right to be reimbursed pursuant to rule 23.05 (b) (i).

[44] The more difficult question is whether, in view of the non-disclosure, Mr Drady, or his counsel, should now be ordered to pay such costs. I am satisfied that this is the sole ground on which such an order could be justified. In my judgment, the issue turns on whether counsel had a duty to provide the information and, if so, whether the failure to do so was so deserving of censure as to justify the order now requested.

[45] I have not been referred to any decisions in which the disclosure obligations of parties at case management conferences - and the manner in which counsel there must walk the line between the duties to their clients and to the court - have been considered. At the conferences, the parties continued to be in an adversarial relationship and were negotiating at arm's length. Their obligations to protect their clients' interests also continued. Independently of the case conference, plaintiffs' counsel had no obligation at that time to advise the defendant, or the third

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parties, that the statement of claim in the Drady action had been issued. I have no doubt that a desire not to prejudice their client's position with respect to costs was in the forefront of the minds of plaintiff's counsel at the case conferences as well as those of the defendant. Plaintiff's counsel had indicated his understanding that he was only required to address the Drady/Taylor proceeding and he was not ordered to do otherwise. There is no reason to doubt that he would have made disclosure if directed to do so. The learned judge had stated that the third parties could inquire whether there was an intention to split the proceedings and accepted that the plaintiffs "may or may not tell you".

[46] The purpose of the amendments to the statement of claim in Drady/Taylor was to sever the generic claims from the product specific claims of Ms Taylor. The purpose was not to abandon the former. The third parties agreed to waive their costs even though they had received unequivocal notice that a generic action might be commenced. The court had not ordered plaintiffs' counsel to declare their intentions in that regard, and had indicated that they were not precluded from commencing such an action. Having waived their costs on June 19, 2006, any entitlement of the third parties to costs would not have revived if the Drady action had been commenced shortly thereafter. Despite this, the third parties were still prepared to accept the risk that the Drady/Taylor action would, in effect, be split between two actions.

[47] If the third parties had received notice of the commencement of the Drady action before June 19, 2006, they might have decided not to waive their costs. However, in view of the fact that they agreed to discontinue without costs with knowledge that Mr Drady was entitled to commence a new generic action at any time, I do not attribute much weight to the third parties' lost opportunity to protect their costs. For the purposes of the costs of the Drady/Taylor action, I do not think it matters whether the Drady action was commenced before, or - as it might have been - after, June 19, 2006.

[48] At the conference on September, 25, 2006, Winkler J. expressed considerable displeasure that plaintiff's counsel had permitted the discussion on June 19 to be focused on their client's future intentions. He deplored the fact that the court's understanding, and discussion, of the issues on June 19 had been affected by what plaintiff's counsel described as their tactical decisions. He did not, however, suggest that any decisions taken previously were vitiated. His displeasure appears to have been primarily directed at the fact that, if disclosure had been made, the issues that arose out of the Drady action could, and would, have been addressed at the case conferences in March and June. Instead, these conferences proceeded on an assumption that the issues were, at least temporarily, off the table. In consequence, the court's time had been wasted. The order in respect of costs thrown away that was signed after the September 25, 2006 conference should, I believe, be understood accordingly and consistently with the costs requested by the third parties in their written and oral submissions at the conference. Although I have no doubt that counsel's decision to refrain from communicating the existence of the Drady action was motivated by a desire to protect their client's interests, such costs can reasonably be regarded as case management costs thrown away as a result of the decision. On balance, I believe it would be too harsh a sanction to penalise Mr Drady, or his counsel, in the more extensive manner requested by counsel for the third parties.

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[49] In consequence, there will be no order for the costs of the Drady/Taylor action other than an award of costs in favour of the third parties, and against the plaintiff, for the wasted time and expense incurred by the former as a result of the plaintiff's failure to disclose the existence of the Drady action on March 6 and June 19, 2006. These costs will be confined to those of the preparation for, and attendance at, those conferences and that of September 25, 2006.

#### 8. Class proceedings considerations

[50] If the amounts claimed as costs by the defendant and the third parties are to be accepted, the above conclusions will subject the plaintiff to a substantial liability for costs. The possible relevance of the fact that the action was commenced under the CPA and, in particular, the provisions of section 31 (1) of the statute is therefore of considerable importance.

[51] When exercising its discretion with respect to costs pursuant to the *Courts of Justice Act*, the court is authorized by section 31 (1) of the CPA to consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest. The special significance of the provision in class proceedings has been confirmed by the Court of Appeal in *Pearson v. Inco Ltd.* (2006), 267 D.L.R. (4<sup>th</sup>) 111.

[52] As is apparent from its terms, section 31 (1) does not in any sense supplant the general discretion of the court in awarding costs. At the most, it permits special weight to be attributed to the three considerations it identifies. Although its terms do not restrict its application to cases where costs are sought against an unsuccessful plaintiff, this is the usual context in which it has been held to apply. I note, however, that in *Pearson* (at para 8) the section was held to justify an increased award of costs to a successful plaintiff. In all such cases, the general objectives of the CPA and, in particular, that of access to justice are also relevant considerations.

[53] As the three factors are matters to be taken into account in the exercise of the court's discretion, there is no reason why their existence might not, in an appropriate case, justify a reduction - rather than a denial - of costs otherwise payable by an unsuccessful plaintiff.

[54] The facts and the claims in this case involved novel questions of law relating to the liability of the Crown for regulatory negligence in respect of generic products. The importance of these questions in connection with the Crown's obligations to the public under the *Food and Drugs Act*, R.S.C. 1985, c. F. 27 extends beyond the interests of the plaintiff and the class to all Canadians. The novelty of the generic claims was recognized by the case management judge (page 23 of the transcript of September 25, 2006) and it is my understanding that it provided the principal - and perhaps the only - ground on which he permitted the motions to be heard before certification.

[55] At the same time, I believe it is relevant, although not necessarily decisive against an application of the section, that the claims here were struck on the ground that it was plain and obvious that they could not succeed. In my judgment, the novelty and public importance of the issues of law - while not sufficient to absolve the plaintiff from any award of costs - will justify a significant reduction in those that would otherwise be ordered.

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[56] There was also novelty in the position adopted by Mr Legge at the hearing of the several liability motion. He argued quite emphatically that the Crown was liable for the full amount of Mr Drady's damages but that the nature of the claims against the Crown excluded any possible right of contribution or indemnity. I would have rejected this argument which excludes the possibility of a finding that any part of the plaintiff's damages were caused by the neglect or fault of any of the third parties, or anyone else. However, as I indicated in my reasons for the decision on the motion, plaintiff's counsel subsequently modified their position by basing the absence of contribution on an interpretation of the pleading that limited the plaintiff's claims to the extent that his damages were caused by the fault or neglect of the Crown. As contribution under section 1 of the *Negligence Act*, R.S.O. 1990, c. N.1 (as amended) is to reflect relative degrees of fault, and not degrees of causation, even this modified approach would not necessarily limit the liability of the Crown to amounts for which it would have no right of contribution. It would therefore not be limited to the Crown's "several liability" in the sense supported by counsel for the third parties, although it was, I think, the intention of plaintiff's counsel that it should have this effect. I am not inclined to attribute any weight to the novelty of the plaintiff's position with respect to contribution.

[57] In determining the quantum of the costs to be fixed, I am satisfied that I should also give weight to the fact that the action was instituted to provide access to justice to a class of disadvantaged persons. However, while not ignoring the chilling effect that large costs awards may have on access to justice under the CPA, I am not disposed to place great weight on what plaintiff's counsel described as the "vast discrepancy of financial resources between this plaintiff and the Crown and third parties". In my experience, it is almost unheard of in class proceedings in this jurisdiction for there to be no agreement, or understanding, between plaintiffs and class counsel in respect of the payment of costs if the action is unsuccessful. There is no evidence, and there has not been any suggestion, that this case is different. The plaintiff has claimed solicitor-and-client privilege with respect to the retainer agreement with his solicitors and I have not been provided with it. He has requested that any discussions with respect to it should take place in the absence of the defendant and, inferentially, of the third parties. In these circumstances, I believe the following comment of Winkler J. in *Attis*, [2007] O.J. No. 2990 (S.C.J.), at para 9, is pertinent:

The court must assume that the risk of an adverse cost award that is reflective of the plaintiffs' choice [to commence a class proceeding] is a consideration that was taken into account by the plaintiffs prior to the initiation of the action as a class proceeding. Indeed, it is incumbent upon counsel to advise a potential representative plaintiff accordingly.

## 7. Quantum

[58] I have held that:

- (a) the defendant is entitled to have his costs of the Several Liability motion in the Drady action paid by the third parties;

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- (b) the defendant is entitled to have his costs of the Ragoonanan and Rule 21 motions paid by the plaintiff;
- (c) the third parties are entitled to costs against the plaintiff for the Ragoonanan motions;
- (d) the third parties are entitled have their costs of the Drady action paid by the plaintiff; and
- (e) the third parties are to have some costs from the plaintiff for the time and expense they expended as a result of the failure of plaintiff's counsel to disclose that the Drady action had been commenced.

[59] I will deal with the quantum of each of these awards in turn. No case has been made out for providing more than a partial indemnity in respect of any of them. For the purpose of fixing the costs, I can, of course, exercise my judgment and discretion only on the basis of the material that has been provided to me. I have been given sufficient material to enable me to fix the amounts without plucking numbers from the air, but not enough to be able to claim that they are anything more than an approximation of appropriate amounts. I am satisfied, however, that, in general, the amounts claimed in respect of the motions are far in excess of what a party who was unsuccessful on a pleadings motion would reasonably expect, or be expected, to have to pay.

(a) The several liability motion

[60] The Attorney General's costs of the motion brought by the Drady third parties are fixed provisionally (i.e., subject to reduction pursuant to section 31 of the CPA) at \$11,000, inclusive of GST and disbursements. in the two cases.

(b) Defendant's costs of the Rule 21 and the Ragoonanan motions.

[61] The amount of \$130,495 claimed in respect of these motions exceeds what might reasonably be awarded in respect of them. Six lawyers were involved in the preparation of the motions and five of them appeared for the Attorney General at the hearing. Costs are fixed provisionally at \$45,000

(c) Third parties' costs of the Ragoonanan motions

[62] In the material filed it is not possible to isolate the time spent by each of the third parties on these motions from that on the several liability motion. In total, the third parties' time on the Ragoonanan motions, alone, appears to be in the order of \$125,000. Their counsel filed a joint motion record and factum and the submissions at their hearing were for the most part made by one of them on behalf of them all. In these circumstances, I believe a single award of costs is justified. These are fixed provisionally at \$25,000

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(d) Third parties' costs of the Drady action

[63] The costs of the Drady action - other than those of the motions - are provisionally fixed at \$7,500 in respect of each of the third parties (with those represented by the same solicitors to be treated as one party). An additional amount of \$5,000 will be payable to Ms Sharp's clients as she had the responsibility of co-ordinating the defences to the third party claims.

(e) Costs thrown away in the Drady/Taylor action

[64] These are provisionally fixed at \$2,500 for each of the third parties (with those represented by the same solicitors to be treated as one party).

8. Section 31 reduction

[65] Each of the amounts provisionally fixed to be paid by Mr Drady will be reduced by two-thirds. In view of the history of the proceeding as a whole, and the fact that the plaintiff failed by an application of the plain and obvious test as applied to his pleading, I do not believe it would be a fitting exercise of my discretion to relieve the plaintiff of all liability for costs.

[66] In addition to the amount so determined, the third parties will be entitled to have any disbursements specifically claimed and identified in their written submissions on costs in respect of the Ragoonanan motions.

[67] The amounts to be paid by the third parties and the plaintiff are inclusive of GST and their costs of the preparation of costs submissions. They are to be paid within 30 days of the release of these reasons.

  
CULLITY J.

Released: January 24, 2008

COURT FILE NO.: 06-CV-307254CP  
DATE: 20080124

ONTARIO  
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KEVAN DRADY

Plaintiff

- and -

THE ATTORNEY GENERAL FOR CANADA

Defendant

- and -

BAXTER HEALTHCARE CORPORATION,  
BAXTER INTERNATIONAL INC., INAMED  
LLC, DOW CORNING CORPORATION, DCC  
LITIGATION FACILITY INC., MEDTRONIC  
XOMED SURGICAL PRODUCTS  
INCORPORATED, SMITHS MEDICAL  
CANADA LTD., BRISTOL MYERS SQUID  
COMPANY, RELIGIOUS HOSPITALERS OF  
ST. JOSEPH OF THE HOTEL DIEU OF  
KINGSTON and DR. A.K. WYLIE

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REASONS FOR DECISION

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CULLITY J.

- 2 -

COURT FILE NO.: 99-CV-181819CP

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KATHRYN ANNE TAYLOR

Plaintiff

- and -

THE ATTORNEY GENERAL FOR CANADA

Defendant

- and -

UNIVERSITY HEALTH NETWORK (Formerly,  
Toronto General Hospital), and DR. W.  
DOBROVOLSKY

Third Parties

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REASONS FOR DECISION

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CULLITY J.