

COURT FILE NO.: 06-CV-307254 CP

DATE: 20070717

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Kevan Drady

Plaintiff

- and -

Her Majesty the Queen in Right of Canada as
represented by the Minister of Health, 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, Dr. A. K. Wyllie

Third Parties

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)
) *Kirk Baert, John Legge and Celeste Poltak,*
) for the Plaintiff, Kevan Drady
)
) *James Soldatich, Adam Rambert, Karen*
) *Watt, Sadian Campbell and Susan Keenan*
) for the Defendant, Her Majesty the Queen
) in Right of Canada
)
) *Mirilyn Sharp,* for the Third Parties,
) Baxter Healthcare Corporation and
) Baxter International Inc.
)
) *Robby Bernstein,* for the Third party,
) Smith's Medical Canada Ltd.
)
) *Patrick Hawkins,* for the Third Party,
) Religious Hospitallers of St Joseph
) of the Hotel Dieu of Kingston
)
) *Laura F. Cooper,* for the Third Party,
) Bristol, Myers Squibb Company
)
) *Gillian Slaughter,* for the Third party,
) Dr A. K. Wyllie
)
) *S. Wayne Morris and Gillian Eckler,*
) for the Third Party, Dow Corning
) Corporation
)
) *Patti Latimer,* the Third Party, Inamed LLC
)
) *Patrick O Kelly,* for the Third party,
) Medtronic Xomed Surgical Products
) Incorporated
)
)
) HEARD: June 26, 27, 28, and 29, 2007

COURT FILE NO.: 99-CV-181819 CP

BETWEEN:

Kathryn Anne Taylor

Plaintiff

- and -

Her Majesty the Queen in Right of Canada as represented by the Minister of Health, the Attorney General for Canada

Defendant

- and -

University Health Network (formerly Toronto General Hospital), Dr. W. Dobrovolsky

Third Parties

)
)
) *Kirk Baert, John Legge and Celeste Poltak,*
) for the Plaintiff, Kathryn Anne Taylor
)
) *James Soldatich, Adam Rambert, Karen*
) *Watt, Sadian Campbell and Susan Keenan*
) for the Defendant, Her Majesty the Queen
) in Right of Canada
)
) *Patrick Hawkins* for the Third Party,
) University Health Network
)
) *Margaret Waddell,* for the Third Party, Dr.
) W. Dobrovolsky
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) HEARD: June 26, 27, 28 and 29, 2007

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISIONS

CULLITY J.:

[1] These two actions (“Drady” and “Taylor” respectively), commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, involve claims for damages caused by the insertion of implants (“TMJ implants”) into the temporomandibular joints in the jaws of the respective plaintiffs. In each case, the sole defendant is her Majesty the Queen in Right of Canada (the

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"Crown"). Damages are claimed for negligence and for breaches of fiduciary duty and, in addition, the plaintiffs seek mandatory orders or declarations, and damages based on breaches of section 7 of the *Canadian Charter of Rights and Freedoms*. Apart from particulars relating to the plaintiffs, the description of the implants and the circumstances in which they received them, the statements of claim are virtually identical. The classes that the plaintiffs seek to represent consist of persons resident in Canada, outside British Columbia and Quebec, who received the TMJ implants.

[2] A statement of defence has been delivered in each case and the Crown has served third party claims for contribution or indemnity. The third parties are alleged to be manufacturers of the type of implant referred to in each of the statements of claim, hospitals where they were allegedly inserted in the particular plaintiff's jaw, and the surgeon involved.

[3] Neither proceeding has yet been certified. A certification motion in Taylor has been set down to be heard in the week of July 23, 2007. With the permission of Winkler J., before his elevation to the Court of Appeal as Chief Justice of Ontario, a number of separate motions under rule 21.01 (1) (b) were to be dealt with prior to certification. Some of these were heard together and the others consecutively commencing on June 26, 2007.

[4] In the order in which they were heard, the motions were as follows:

(a) motions by the third parties in each of the actions to strike the third party claims on the ground that it was plain and obvious that the Crown could have no right to contribution from them;

(b) motions by the third parties in Drady, and by the Crown, to strike the statement of claim and, in the case of the third parties, the third party claims against them on the basis of what was described as the Ragoonanan principle;

(c) a motion by the plaintiff in Drady to sever, or stay, the third party claims until proceedings between the plaintiff and the defendant had been disposed of; and

(d) a motion by the Crown to strike the statement of claim in Drady on the ground that, independently of the Ragoonanan principle, it disclosed no reasonable cause of action for negligence, breach of fiduciary duty or a violation of section 7 of the *Charter*.

[5] The order in which the motions were heard was largely determined by the convenience of counsel and a justifiable assumption that some, at least, of the decisions on the motions would be reserved. As success for the moving parties in the second and the last motion would make decisions in the other motions moot, it would, no doubt, have been more logical to deal with the latter after, and only if, the former were dismissed. As all of the decisions were reserved, I will

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deal with each of them commencing with the motions in (d) above, followed by those in (b), (a) and (c) in that order.

1. The Crown's motion to strike the claim for failure to disclose a reasonable cause of action for negligence, breach of fiduciary duty or breach of section 7 of the Charter independently of the Ragoonanen principle

(a) Negligence

[6] Counsel for the Crown submitted that the allegations in the statement of claim are incapable of establishing that it owed a private law duty of care and, in consequence, on the basis of the plain and obvious test that is to be applied to motions under rule 21.01 (1) (b), there should be an order striking the claims for negligence.

[7] It is alleged in the pleading that Mr Brady received TMJ implants containing "silastic". This is said to be a term used by health-care professionals as a generic reference to silicone-based products. It is pleaded further that Mr Brady suffered serious injuries as a consequence of receiving the implants and that such injuries were entirely caused by the negligence of the Crown.

[8] The various breaches of a duty of care that have been pleaded are premised on the Crown's alleged knowledge that TMJ implants containing silastic created serious dangers to the health of their recipients. In view of this knowledge, it is claimed that the Crown, through its servants, breached a private law duty of care:

- (a) by not preventing the importation and sale of such implants;
- (b) by making regulations pursuant to its statutory powers negligently;
- (c) by not exercising its statutory and regulatory powers to require proper labelling, and compliance with the regulations in other respects;
- (d) by not warning health care professionals and the potential recipients of the risks attaching to the devices;
- (e) by not monitoring the consequences of the insertion of the implants; and
- (f) by not "remediating" the injuries suffered.

[9] These breaches of duty are attributed to the Minister of Health and the employees of the department now known as Health Canada in the purported exercise of statutory powers.

[10] It is accepted that, in determining whether a Minister, or other governmental body exercising statutory powers, has a private law duty of care, the starting point must be a consideration of the provisions of the relevant statutes. While the existence of such a duty need not be stated explicitly in the statute, its provisions must be examined for

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factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to their relationship to impose a duty of care upon the defendant: *Cooper v. Hobart*, [2001] 3 S.C.R. 537, para 34.

[11] By the same token, such an examination may reveal that a private law duty may be negated by inferences from the statute that any duties that are imposed are owed to the public, and not to private individuals.

[12] The statute that received most attention in this case is the *Food and Drugs Act*, S.C. 1952 - 53, c.38. The provisions of the statute are to be administered by the Minister of Health and it may well be appropriate to read them in the light of the general policies and duties of the Minister under the *Canada Health Act*, R.S.C. 1985, c. C-6 and the *Department of Health Act*, S.C. 1996, c. 8. These include the protection, promotion and restoration of the physical and mental well-being of Canadian residents, and their protection against risks to their health.

[13] The emphasis in the relevant provisions of the FDA is almost entirely on duties imposed, not on the Crown, but on the manufacturers, importers and vendors of medical and surgical devices.

[14] From 1953 to the present time, the structure and general effect of the FDA has remained unchanged. It is concerned essentially with prohibiting the advertisement or sale of food, drugs, cosmetics or "devices" in specified circumstances, and providing for the enforcement of its provisions by inspectors to be appointed by Health Canada. The Minister has extensive discretionary powers relating to the enforcement and, under the existing provisions, relating to the provision and refusal of certificates of compliance. Throughout the period, "devices" have been defined to include any instrument, apparatus or contrivance sold or represented for use in the treatment or mitigation of a disorder, abnormal physical state or the symptoms thereof.

[15] At all material times the Governor in Council has been empowered to make regulations for carrying the purposes and provisions of the Act into effect, including regulations:

- (a) respecting the advertising of devices to prevent consumers from being misled as to their safety and to prevent injury to their health;
- (b) prescribing standards of composition for devices;
- (c) respecting the importation of devices in order to ensure compliance with the Act and the regulations;
- (d) respecting the method of preparation of devices in the interests of, or for the prevention of injury to, the health of consumers;

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(e) requiring persons who sell devices to maintain such books and records as the Governor in Council considers necessary for the proper enforcement and administration of the Act and the regulations;

(f) prescribing the conditions of manufacture, including the qualifications of technical staff in respect of devices;

(g) respecting the powers and duties of inspectors and analysts and the taking of samples and the seizure, detention, forfeiture and disposition of articles; and

(h) exempting any device from any of the provisions of the Act, and prescribing the conditions of such exemptions.

[16] There are no provisions of the FDA that expressly purport to impose either public or private duties on Health Canada. Sections 19 - to 21 of the present Act - which are materially identical to sections 18 - 20 of the statute enacted in 1953 - provide as follows:

19. No person shall sell any device that, when used according to directions or under such conditions as are customary or usual, may cause injury to the health of the purchaser or use thereof.

20. (1) No person shall label, package, treat, process, sell or advertise any device in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its design, construction, performance, intended use, quantity, character, value, composition, merit or safety.

(2) a device that is not labelled or packaged as required by, or is labelled or packaged contrary to, the regulations shall be deemed to be labelled or packaged contrary to subsection (1).

21. Where a standard has been prescribed for a device, no person shall label, package, sell or advertise any article in such a manner that it is likely to be mistaken for that device, unless the article complies with the prescribed standard.

[17] Although the relevant provisions of the FDA have not changed significantly since its original enactment, the regulations made pursuant to it have been expanded considerably. Until the Medical Devices Regulations of September 2, 1976 were made, manufacturers and vendors had no obligation to provide information to Health Canada before importing or selling devices. After April 1, 1976 Health Canada was to be provided with a notification containing prescribed information within 10 days of the first sale of a device. Evidence of the safety and effectiveness of devices was not, however, required unless requested by Health Canada until 1983 when the sale of new devices was prohibited unless a notice of compliance had been obtained from the Department. For that purpose prescribed evidence of the safety of the device was required.

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[18] The question whether the provisions of the FDA and the regulations create a private law duty of care has been recently considered by the Divisional Court in *Klein v. American Medical Systems, Inc.*, [2006] O.J. No. 5181 and by judges of this court in *Attis v. Her Majesty the Queen in Right of Canada et al*, [2007] and *Baric v. Tomalc*, [2006] O.J. No. 890. In *Klein* and *Attis*, the Crown's motions to strike for failure to plead a cause of action were successful. In *Baric*, the motion was dismissed on grounds there were held in *Attis* to be sufficient to distinguish the decision. In both *Klein* and *Addis* it was held that the provisions of the FDA did not give rise to a private duty of care. In *Attis*, at paras 28 - 30, Winkler J. stated:

There is no dispute that the provisions and regulations cited by the plaintiffs establish a general regulatory scheme meant to operate for the benefit of the public at large. The issue is whether the statutory and regulatory scheme creates a private law duty of care owed to plaintiffs individually by the government. In other words, is "proximity" sufficiently "grounded in the governing statute" to create such a private law duty of care? In my view, it is not. The scheme imposes specific duties on manufacturers, distributors or sellers of medical devices. It is plain and obvious, however, that no such obligations are attributed to the government so as to create a private law duty of care. ...

No reasonable interpretation of s. 19 can lead to the conclusion that it imposes a private law duty of care on the government in respect of the sale of medical devices to the public. It is clear that the duty imposed rests with the seller.

[19] In para 42, the learned judge referred to the allegation - also made in this case - that the Crown had a duty to prohibit the use of the devices in question:

An allegation that there was a "duty to prohibit" is akin to an allegation that there is a duty to govern in a certain way. By extension that renders the plaintiff's claim one of a failure to regulate *simpliciter* or, in other words, a failure to govern. That is a manifest policy decision and it is well settled that, as such, it is immune from civil liability. The underlying reasons for such immunity are well-stated by Hugessen J. in *A.O. Farms Inc. v. Canada*, [2000] F.C.J. No. 1771, at para 11:

The relationship between the government and the governed is not one of individual proximity. Many, perhaps most, government actions are likely to cause harm to some members of the public. That is why government is not an easy matter. Of course, the government owes a duty to the public but it is a duty owed to the public collectively and not

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individually. The remedy for those who think that duty has not been fulfilled is at the polls and not before the Courts.

[20] I am in respectful agreement with this analysis and I consider it equally applicable for the purposes of this case. The provisions of the FDA, and the regulations made pursuant to it, are not "aimed at, or geared to, the protection of the private interests of specific individuals" any more than those considered in *Eliopoulos v. Ontario (Minister of Health)* (2006), 82 O.R. (3d) 321 (C.A.), at para 17, *per* Sharpe J.A. Any duty imposed (implicitly) in the FDA is to regulate in the interests of the public. A failure to do this efficiently - whether by not obtaining regulations, or not regulating in a particular manner - does not breach any private law duty of care.

[21] Counsel for the plaintiff submitted that the conduct of the Crown in this case should be considered to extend beyond the discharge of duties owed to the public. In his submission, proximity and a private law duty of care can arise from the manner in which a public duty is implemented in the circumstances of a particular case. He submitted, further, that it was, at least, not plain and obvious that this result could not be reached at a trial.

[22] It is my understanding that this argument was accepted in *Baric* where the statement of claim contained lengthy allegations of Health Canada's inaction when, over a period of several years, it had allegedly ignored repeated notice that a particular United States corporation was breaching its obligations under the FDA. Very similar - if not the same - allegations are made in this case with respect to the same vendor. There is, however, one difference that I consider significant. In *Baric* the plaintiff received implants sold by the particular importer/vendor to whom the Crown's alleged breaches of duty related. In this case, although the allegations relied on by the plaintiff appear to relate to the same implants (Vitek Proplast implants) of the same vendor/importer whose breaches of duty were allegedly ignored by the Crown in *Baric*, it is not pleaded that Mr Drady received any such implants. In paragraphs 25-29 of the reply to the defendant's statement of defence it is stated that he does not know the "composite, type or manufacture" of the silastic in the implants he received or of the implants themselves.

[23] In these circumstances - independently of any other considerations - the facts alleged with respect to the Crown's operational negligence with respect to the Vitek Proplast implants are, in my judgment, insufficient to give rise to relationship of proximity between it and Mr Drady. Under the FDA and the regulations, the Crown does not regulate devices generically or by categories. Its powers and responsibilities are confined to dealing with particular devices sold, or to be sold, in Canada on a case by case basis.. The Crown's alleged negligence in respect of the defaults of the Vitek Proplast implant vendor cannot create proximity with Mr Drady if it is not alleged that he received such a device.

[24] Independently of any other considerations, a causal connection between the plaintiff, the device and its vendor is an essential link in the creation of a relationship of proximity between the plaintiff and the Crown. This, I believe, is consistent with the analysis of Iacobucci J. in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 363 where, in considering whether proximity had existed between a deceased person and the Police Services Board, he stated (at para 64):

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The first factor that I consider is the lack of a close causal connection between the alleged misconduct and the complained of harm.

[25] It follows that the scope of any duty of care that might exist between the Crown and those who received the Vitek Proplast implants cannot, in my opinion, extend to a person who did not receive them. It would be confined to those who, like the plaintiff in *Baric*, received the Vitek Proplast device and the material fact of such receipt would need to be pleaded for a cause of action to be disclosed. This has not been done and I do not believe the allegation that the plaintiff's inability to do so was caused, or contributed to, by the Crown's failure to require all implants to be labelled, and information to be provided, in accordance with regulations under the FDA materially alters the situation. At the most, this failure would amount to a breach of a duty owed to the public. In my opinion, an essential requirement for establishing proximity cannot be grounded in a breach of a duty owed only to the public.

[26] In consequence, the allegations of fact in this case are distinguishable from those in *Baric*. It is, in my view, plain and obvious that the alleged conduct of the Crown when dealing with the Vitek Proplast device and its vendor did not give rise to a relationship of proximity and a duty of care owed by the Crown to Mr Drady.

[27] For the above reasons, I find that the statement of claim discloses no reasonable cause of action for negligence against the Crown.

(b) Breach of fiduciary duty

[28] I am satisfied that the plaintiff's case is not improved by an attempt to recharacterize the alleged breach of a duty of care as a breach of a fiduciary duty. While most, if not all, duties of the Crown can be considered as created and imposed for the benefit and protection of members of the community who are, in a sense, always vulnerable to, and dependent on, the Crown's exercise of its discretionary powers, they are not thereby converted into fiduciary duties. *Guerin v. Canada*, [1984] 2 S.C.R. 335, at page 385; *Rogers v. Faught* (2002), 212 D.L.R. (4th) 366 (C.A.), at para 29. As Simpson J. stated in *Squamish Indian Band v. Canada* (2001), 207 F.T.R. 1, at para 521 (F.C.T.D.):

... in matters of public law, discretion and vulnerability can exist without triggering a fiduciary standard. There would have to be special circumstances, other than those created by the legislation, to justify the imposition of a fiduciary duty on the Crown.

[29] Essentially the same distinction between duties owed to the public and private law duties must be drawn. For the same reason as that given for denying the existence of a private law duty of care, I do not consider the alleged conduct of Health Canada and its employees with respect to its functions, responsibilities and powers under the FDA can properly be characterised as breaches of fiduciary duty.

(c) Breach of section 7 of the Charter

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[30] Section 7 of the Charter provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[31] In paragraph 2 (a) of the pleading the plaintiff claims that the Crown's breach of its legal obligations "as pleaded herein" constituted violations of the plaintiff's rights under section 7 and that such violations did not constitute reasonable limitations that would be justified under section 1. In paragraph 2 (b) the plaintiff claims a declaration that "these violations of the plaintiff's rights" were not in accordance with the applicable principles of fundamental or natural justice.

[32] Paragraphs 182 and 183 of the statement of claim contain the following allegations:

182. The Plaintiff states that the severe effects upon her of the breaches by the Defendants of their legal obligations to the Plaintiff are to deprive her of liberty and security of the person, contrary to S. 7 of the *Charter of Rights and Freedoms*.

183. The Plaintiff states that the disfigurement, permanent disability and chronic debilitating pain suffered by residents of Canada as a result of failure of alloplastic TMJ implants inserted in Canada has caused or contributed to the suicide of several such persons. The Plaintiff states that such suicides would not have occurred but for the breaches of legal obligations by the Defendants. As such, these persons have been deprived of life, contrary to s.7 of the *Charter of Rights and Freedoms*. (*sic., passim*)

[33] Counsel for the Crown submitted that, as the claims under section 7 were clearly and entirely premised on findings that the Crown had breached the private law legal duties pleaded, and, as I have made findings to the contrary, the Charter claims could not be sustained. I accept that submission.

[34] I did not understand the plaintiff to assert that, notwithstanding the absence of private law remedies for breach of duties owed to the public, such breaches could constitute violations of section 7. In the submission of counsel for the Crown this could not occur on the basis of the facts pleaded in this case as the alleged defaults of the Crown amounted to inaction that could not, on the authorities - including *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 and *Wynberg v. Ontario* (2006), 269 D.L.R. (4th) 435 (C.A.) - constitute a deprivation for purposes of section 7. The authorities I have mentioned have left open the possibility that section 7 may eventually be interpreted as imposing positive obligations to act and, in view of this, and the fact that it is unnecessary to consider the question, I will not comment on it.

[35] For the above reasons, there will be an order striking the statement of claim in its entirety.

2. Motions to strike based on the Ragoonanan principle

[36] The Crown and the third parties in the Drady action moved to strike the statement of claim on the basis of the rule that, for each defendant to an action commenced under the CPA, there must be an intended representative plaintiff with a cause of action against that defendant. This principle was established by the decision of Cumming J. in *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.) and its approval by the Court of Appeal in *Hughes v. Sunbeam Corp (Canada)* (2002), 61 O.R. (3d) 433.

[37] I have concluded that it is plain and obvious that the plaintiff has no chance of establishing the causes of action that were pleaded. The Ragoonanan principle is advanced by the moving parties as an additional reason for reaching the same conclusion.

[38] At first sight it is, perhaps, difficult to understand how the principle is offended by the pleading in Drady. The Crown is the only defendant and causes of action for failing to regulate the sale of implants containing silastic are alleged against it.

[39] The authority on which the moving parties rely for an application of the Ragoonanan principle to the facts of this case is the decision of Winkler J. in *Attis v. Canada (Minister of Health)* (2003), 29 C.P.C. (5th) 242 (S.C.J.) that was decided before the hearing of the certification motion that I have referred to above.

[40] In *Attis*, as here, the plaintiffs claims were against the Crown in Right of Canada exclusively. Allegations of negligence for not preventing the distribution and sale of certain breast implants were pleaded. The Crown indicated its intention to add particular manufacturers (the "Settled Entities") of the implants as third parties. Each of the plaintiffs had received implants manufactured by the same entity ("Dow Corning").

[41] The Settled Entities were given leave to join in the Crown's motion to strike. Winkler J. held that the Ragoonanan principle should be extended to the case before him on the ground that it was apparent that the foundation for the claim against the Crown was contingent on the product of a particular manufacturer being found to be defective, or otherwise unsafe. He stated (at para 40):

A class proceeding requires that a representative plaintiff establish a factual connection between the putative class, the cause of action put forward on behalf of that class, and the defendant. A representative plaintiff must, by definition, fairly and adequately represent the class. This means that the representative plaintiff must be capable of asserting a cause of action on behalf of all of the class members as against the defendant.... The plaintiffs allege that the Attorney General is liable to them and must compensate each class member for her injuries on the basis that he was negligent in permitting the alleged defective breast implants of all of these manufacturers into the market. The representative plaintiffs have pleaded and presumably can adduce evidence that

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Dow Corning implants are defective or unsafe but they have not done so, nor could they, in respect of [other implants]. The representative plaintiffs may be able to establish the liability of the Attorney General in respect of the implants of Dow Corning. However the threshold for establishing liability on the part of the government is that there is a defective product for which a representative plaintiff can establish the defect and put forward evidence that a class in similar circumstances to her exists. Therefore, the representative plaintiffs cannot on the face of the present pleading meet the threshold of showing a reasonable cause of action as against the Attorney General, with respect to any manufacturer other than Dow Corning. Hence, the non-Dow Corning claims are merely speculative claims as against the Attorney General within the meaning of Ragoonanan. In my view, the representative plaintiffs can assert no cause of action relating to the non-Dow Corning products, as against the Attorney General. Thus the claim as it relates to the manufacturers, other than Dow Corning, must be struck.

[42] Unlike the plaintiff in *Attis*, the statement of claim in *Drady* does not allege that the plaintiff received implants of a particular manufacturer. Instead, it is pleaded that he received a silastic implant and the claims are made on behalf of a class of persons who received such implants irrespective of the identities of the manufacturers and any differences in the composition of the devices in other respects. In that sense, and to that extent, this is not a case to which one could apply the comment of Winkler J. that the plaintiff's claims are only made in relation to the products of a particular manufacturer.

[43] Nonetheless, I am satisfied that the reasoning of the learned judge can properly be adapted and applied to this case. The substance of the plaintiff's claims is a failure to regulate. Under the FDA, and the regulations, Health Canada is to regulate devices on a case-by-case basis. Its alleged failure to regulate must be understood in this context. As in *Attis*, the liability of the Crown for failing to regulate can only be considered *vis a vis* particular devices and their manufacturers or vendors. The pleading is, therefore, defective in that it relies on alleged regulatory facts that relate only to one device - the Vitek Proplast TMJ implant - and there is, moreover, no plaintiff who claims to have received it.

[44] I am satisfied that, as stated in the Crown's notice of motion, the following ground for an order striking the statement of claim is compelling:

There can only be a reasonable cause of action against the Attorney General in regulatory negligence for failure to regulate a product for which there was a factual connection between the representative plaintiff and the specific product alleged to have caused damage. The plaintiff in this case does not know what product was implanted into his TMJs and has not established any

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factual connection with a specific product. The Attorney General cannot defend an action brought by representative plaintiff who is unable to provide facts supporting his connection with a specific product.

[45] In consequence, an order striking the statement of claim would be granted on this motion also.

3. Motions to strike the third party claims on the ground that the Crown could have no right to contribution or indemnity.

[46] The third parties in Drady and Taylor moved to strike the third party claims on the ground that it was plain and obvious that the Crown could have no right to contribution from them.

[47] In the submission of Ms Sharp - supported by counsel for the other third parties - this conclusion followed inexorably from the manner in which the plaintiff's claims against the Crown have been pleaded. She submitted that it is plain and obvious in the statement of claim that the plaintiff's claims were limited to an amount of the damages suffered by the plaintiff, and the putative class members, for which the defendant could not claim contribution from any other tortfeasors. It followed, she submitted, that the third party claims were untenable and should be struck.

[48] Ms Sharp's initial submission that the pleading excluded claims for contribution was based on an interpretation that would limit the plaintiff's claims to damages caused solely by the Crown. Paragraph 17 of the notice of motion is as follows:

17. Because the Defendant's liability to the Plaintiff is expressly limited to its own several liability to the Plaintiff, and specifically any loss that it alone caused to the Plaintiff and the proposed class, there is no tenable cause of action by the Defendant against the Third Parties.

[49] I accept that, if the pleading is to be interpreted in this manner, there would be no right to contribution under section 1 of the *Negligence Act*, R.S.O. 1990, c. N1 in such a case as the right is predicated on a finding that two or more persons contributed causally to the plaintiff's damages. The section is as follows:

1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make

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contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

[50] A plea that the defendant is liable only for a damages to which no one else contributed causally would exclude a right to contribution but, given the principles of causation propounded in cases such as *Arthey v. Leonati*, [1996] 3 S.C.R. 458, it might also appear be a remarkably limited claim.

[51] Section 1 is premised on a finding that two or more persons contributed causally to a plaintiff's damages. Where that has happened, each of such persons is severally (separately) liable for the full amount of the damages but has a statutory right to contribution or indemnity from the other, or others. The proportions in which the damages are to be apportioned between them depends not on a finding that they contributed causally in different degrees but, rather, on the relative degrees of fault or negligence to be attributed to their conduct. The point was made very clearly by Professor Lewis Klar in a passage from his essay in *Studies In Canadian Tort Law* (Butterworths, 1977) that was quoted with approval by Mr Cheifetz in *Apportionment of Fault in Tort* (Canada Law Book Limited, 1981), at page 99:

How degrees of fault are determined is a question which has not been adequately analysed by the courts. What are the courts to consider in making this determination? Are they to consider the causal relationship between the parties' negligence and the injuries, or the degree of culpability of each person's conduct?

The sole factor relevant to this determination is the degree of culpability of the parties - in other words, the courts must consider the extent of the unreasonableness of each party's conduct. The inquiry does not concern causation except to the extent that the court must assure itself that the negligence of each party was factually and legally a cause of the injuries. Once this assurance is made, causation does not enter into the determination of the degrees of fault. It is thus a relatively clear, although arbitrary, task. The court must use the normal test of reasonable versus unreasonable risks used in the determination of all negligence cases to come to a decision as to the degree of the culpability of the parties.

[52] This approach, which treats causation as a prerequisite to contribution, but, for the purpose of contribution, apportion liability by reference to degrees of fault is recognised in numerous cases including *Martin v. Listowel Memorial Hospital* (2001), 51 O.R. (3d) 384 (C.A.); *Renaissance Leisure Group Inc. v. Frazer*, [2004] O.J. No. 3486 (C.A.), and *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298. In *Martin*, for example, the Court of Appeal cited a decision of the Court of Appeal of Nova Scotia in which it was stated that the test was to determine the degrees the parties departed from "the norm of reasonable conduct". See also Klar,

Tort Law (3rd edition, 2003) at page 500; Linden and Feldhusen, *Canadian Tort Law* (8th edition, 2006), page 498.

[53] I believe the short answer to the position advanced on behalf of the third parties in terms of causation - as formulated in the notice of motion and initially by Ms Sharp at the hearing - is that the pleading is quite inconsistent with any suggestion that the plaintiff is claiming only the part of the damages to which no other persons contributed causally by their fault or neglect.

[54] The statement of claim pleads that the plaintiff suffered physical and mental injuries, pain and suffering, loss of enjoyment of life, loss of income and special damages as a result of the insertion of the implants. In paragraph 83 it is stated that the injuries, damages and losses set out in the statement of claim were caused by the negligence of Health Canada. Paragraph 43 of the plaintiff's reply to the statement of defence is as follows:

The Plaintiff state (sic) and the fact is that the Defendant is severally directly liable for any and all damage caused by implantation of the devices at issue in this action.

[55] Mr Rambert was, I believe, correct in his submission that it is abundantly clear that the plaintiff is claiming that the Crown is liable for all the damages he suffered from the implants. At the hearing of the motion, counsel for the plaintiff, Mr Legge, was adamantly opposed to the suggestion that the plaintiff was claiming anything less.

[56] It follows that if, contrary to the position of the plaintiff, a finding was made that another person or persons contributed to the damages claimed, the case would fit squarely within the words of section 1 and the Crown would have a right to contribution.

[57] The difference between a claim that the defendant is liable for all the damages suffered by the plaintiff, and a claim that is limited to the part of the damages caused solely by the defendant is, I believe, critical. While the latter cannot entitle the defendant to contribution, the former can if the plaintiff is unsuccessful in establishing that no other person's negligence or fault was involved.

[58] It follows that the motion to strike the third party claim could only succeed if a finding is made that it is plain and obvious from the pleading that no other persons contributed to the damages that the plaintiff alleges he sustained. Although counsel for the plaintiff advanced this proposition in the course of his motion for severance or a stay, I do not consider it to be tenable and counsel for the third parties did not rely on it at the hearing of this motion.

[59] Early in her submissions - in response to a question whether the third parties were basing their case entirely on the question of causation - Ms Sharp reformulated and enlarged her submissions on the interpretation of the statement of claim. In her revised submission it should be understood as claiming only that part of the plaintiff's loss for which the Crown would not be entitled to contribution or indemnity even if - contrary to the submissions of plaintiff's counsel - other persons had contributed causally to the loss. She submitted that it was plain and obvious that the claims pleaded against the Crown were limited to the amount that, pursuant to section 1

of the *Negligence Act*, would be attributed to the plaintiff in accordance with the relative degree of fault that would attach to its conduct if, hypothetically, there was a right to contribution from other persons whose fault or neglect had contributed to the plaintiff's loss. It followed, in her submission, that as, *ex hypothesi*, the Crown could have no right to contribution in respect of a claim so limited it was plain and obvious that the third party claims could not succeed and should be struck.

[60] Although, in their joint factum, the third parties relied for the most part on their interpretation of the pleading that limited the plaintiff's damages to those caused by the Crown alone, in paragraph 28 they state that the "Plaintiff is seeking only that portion of the damages attributable to the Federal Government's "fault" and that is the amount (if any) that will be assessed against it by this court under section 1 of the *Negligence Act*". This alternative approach is also addressed in the third parties' reply factum.

[61] There is, nothing explicit in the pleading that would suggest that the plaintiff's claims are limited by way of relative degrees of fault any more than by principles of causation. In my opinion any such proposition is inconsistent with the plea that the defendant is liable for all the damages caused by the implants.

[62] The third parties' submission that such a limitation is plain and obvious was based on a few references to the Crown's "several" liability in the plaintiff's pleading and, in particular, to that in the last paragraph of the statement of claim:

193. The plaintiff's claim against her Majesty the Queen in Right of Canada is for the several liability of the Crown for the wrongs committed by its servants as alleged herein.

[63] Persons entitled, and subject, to contribution under section 1 have traditionally been described as either several tortfeasors or joint tortfeasors. Several tortfeasors are those who committed separate torts that caused damage to the plaintiff while the categories of joint tortfeasors are generally limited to cases of agency and vicarious liability, and those where the wrongdoers acted in concert or in breach of a duty imposed on them jointly. The only several tortfeasors who are entitled to contribution are those whose torts contributed to the same damages or loss. These have been described as "several concurrent tortfeasors" to distinguish them from several tortfeasors whose torts caused, or contributed to, different damages: Ontario Law Reform Commission, *Contribution Among Wrongdoers and Contributory Negligence* (1988), pages 7-10; Klar, *Tort Law* (3rd edition, 2003), pages 487-492; Fridman, *The Law of Torts in Canada* (2nd edition, 2002), pages 892-3; Cheifetz, pages 5-8. This terminology is reflected in the statutory stipulation that the contributors are "severally liable to the person suffering loss or damage from such fault or negligence". Each is separately liable for 100 per cent of the damages; either can be sued for that amount; and it can be recovered from that person. This was the position at common law and was not affected by the enactment of the *Negligence Act*. Obviously, the words "severally liable" in section 1 of the statute, do not import any limitation of liability by reference to the relative degrees of fault to be attributed to the tortfeasors. Several liability exists between the plaintiff and each of the wrongdoers. It has

nothing to do with, and is to be distinguished from, their relative degrees of fault. The latter are relevant only to their rights to contribution from each other.

[64] I do not believe there is any doubt that the great majority of situations in which a right to contribution arises in practice involve several, rather than joint, tortfeasors.

[65] In view of the words of section 1 and the traditional terminology it employs, I believe the interpretation of the statement of claim understood by counsel for the Crown is more than reasonable. The plea that the Crown is severally liable for 100 per cent of the damages claimed - damages for virtually every conceivable form of compensable loss - fits fairly and squarely within the language of the section and says nothing to exclude rights of contribution in the event that the Crown could establish that one or more third parties also contributed to the injury and losses suffered by the plaintiff.

[66] Unless some different meaning is to be attributed to the references to several liability in the statement of claim, there is nothing in it to suggest that the plaintiff's claim for damages is to be limited to anything less than 100 per cent of the damages it identifies. On that basis, I believe that the Crown would be entitled to claim that the third parties causally contributed to the damages and to claim contribution from them if a finding was made to that effect.

[67] Ms Sharp's submissions to the contrary were based on a number of recent decisions that have attributed to the words, and the notion of, "several" liability the meaning that imports relative degrees of fault or negligence among co-contributors and have limited the liability of the defendant accordingly. I do not believe any of these cases is authority that, by itself, a plea such as that in paragraph 193 necessarily indicates an intention to limit the Crown's liability to the amount of the plaintiff's damages that would be apportioned to the Crown in accordance with the relative degree of fault that would be attributed to its negligence.

[68] Most of the decisions cited by counsel for the third parties concerned the consequences of settlement agreements entered into between a plaintiff and some, but not all, of the defendants to an action. In these cases, it has become relatively common for the plaintiff to agree to limit its claims against the non-settling defendants in order to prevent claims by the latter for contribution from the settling defendants. Where these agreements have been subsequently implemented by including in a pleading against the non-settling defendants either a limitation of liability to damages caused only by their negligence - as described in *Skyseeds Ltd. v. McLean's Agra Centre Ltd.*, [2000] S.J. No.553 (Q.B.) at para 7; *S. v. King*, [1997] O.J. No. 5409 (G.D.) - or, more commonly, to damages attributed to its own proportionate degree of fault - as in *British Columbia Ferry Corp. v. T&N plc*, [1995] B.C.J. No. 2116 (C.A.); *Holthaus v. Bank of Montreal*, [2000] O.J. No. 951 (C.A.); *J.M. v. Bradley*, [2004] O.J. No. O.J. No. 2312 (C.A.); and *Chapman v. Canada*, [2007] O.J. No. S.J. 176 (Q.B.) - attempts by the non-settling defendants to make third party claims against settling defendants have been unsuccessful.

[69] Although in two of these cases - *Bradley* and *Chapman* - the courts described the limited liability of the non-settling defendants as their "several liability", the plaintiffs' intention to create the limitation in *Bradley* appears to have been otherwise evident from the words of the

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pleading. In none of the cases – other than, perhaps, *Chapman* - has the intention been inferred from a simple reference to the defendant's several liability in the pleading. Nor has it been held that such references are to be interpreted without regard to the rest of the pleading, or that they could override clear indications that the plaintiff was seeking to hold the non-settling defendants liable for the full amount of the damages sustained and not just for an amount that might be apportioned to them in accordance with relative degrees of fault.

[70] The relatively novel use of the words "several liability" in the sense advocated on behalf of the third parties is, I believe, more frequently found in the settlement agreements - rather than in the pleadings that are intended to implement them; see, for example, *Ontario New Home Warranty Program v. Chevron Chemical Co.*, (1999), 46 O.R. (3d) 130 (S.C.J.), at para 54 ("... the plaintiffs have chosen to seek damages only for the amount for which the non-settling defendants are "severally" liable" *per* Winkler J.). It is, I think, likely that the references to several liabilities in the cases simply mirror the words used by the parties to the settlement agreements. Such parties are, of course, entitled to agree upon the meaning of the terms they use.

[71] In this case I am satisfied that Mr Rambert was correct in his submission that the references to several liability in paragraph 193, and elsewhere in the pleading, are insufficient to override the clearly expressed intention to hold the Crown liable for all of the plaintiff's damages, and not just those attributable to its proportionate degree of fault. This was also the position supported by Mr Legge who submitted that the words "several liability" in paragraph 193 of the statement of claim "don't add anything". In his submission, the plaintiff should be understood to claim that the Crown was liable for 100 per cent of the damages solely on the basis of causation. He recognised that, if - as he conceded was possible - a court rejected that claim and found that other persons had contributed causally, a claim for contribution might be made pursuant to section 1 of the *Negligence Act*. Mr Legge stated that, if this occurred, he would be hoist with his own petard.

[72] Although I was provisionally of the opinion that the pleading does not support the interpretation that the third parties wish to place on it, that it is not plain and obvious that the Crown would have no right to contribution and, in consequence, that the motion should be dismissed, I had reserved my decision on the motion in order to have time to review further the authorities that had been cited. On the following day, before the hearing of the motions based on the Ragoonanan principle, Ms Sharp attempted to reopen the question of the meaning to be given to paragraph 193 of the pleading. She provided me with a transcript of a case conference at which, she said, the case management judge had suggested that liability might be limited to the Crown's several liability in the sense she had advocated. I indicated that I thought the propriety of using the transcript to explain the statement of claim was dubious to say the least and, in any event, that it revealed that plaintiff's counsel had expressly declined to take a position on whether to implement the suggestion. Mr Legge's comment was that he had indicated the views he had expressed earlier in the hearing at many other case conferences at which Ms Sharp had not been present.

[73] Very much to my surprise, the question of interpretation was raised yet again on the third day of the hearings when Mr Legge's co-counsel - Mr Baert - began his submissions on the

motion to sever, or stay, the third party proceedings. Mr Baert indicated that, if the plaintiff was unsuccessful in persuading the court that no other person contributed to the damages claimed, he supported the position of the third parties that the plaintiff's claim would then be limited to the amount for which the Crown could not obtain contribution from any third parties who might be found to have contributed to the plaintiff's loss. When I queried whether this was consistent with the position taken by his co-counsel two days earlier, Mr Baert handed me a document signed by each of them which stated, ambiguously, that the plaintiffs claimed only for the damages that are wholly attributable to the defaults of the Crown.

[74] Notwithstanding the belated support given to the third parties by plaintiff's counsel, I continued to be inclined to dismiss the motion by the third parties on the ground that it is not plain and obvious from the statement of claim that the Crown will have no right to contribution. I am satisfied that the pleading is, at the best, ambiguous and that the Crown is entitled to have the position clarified before the proceedings go further. The protestations of counsel for the third parties that the pleading was crystal clear were not persuasive given the initial confusion about the meaning they attributed to it, and the last-minute conversion of plaintiff's counsel.

[75] There is, however, the possibility that – in view of the confusion about the intended meaning of the references to the Crown's several liability – a more appropriate order would be to grant leave to the plaintiff to amend his pleading to limit the liability claimed against the Crown by reference to its relative degree of fault and to insert in the order procedural protections for the Crown relating, for example, to rights of discovery and production of documents. A similar order was made in *British Columbia Ferry*, at para 15, where there was also an order permitting the defendants to apply for a declaration with respect to the relative degrees of fault as between the defendants and the third parties named in the claims that the court had disallowed. My understanding is that counsel for the plaintiff and for the third parties in this case would not be averse to such an order, but that it would be opposed by counsel for the Crown on the ground that it would be procedurally prejudicial to it.

[76] The question of prejudice was considered to some extent in the factum of counsel for the Crown but was not addressed at the hearing to any great degree. In these circumstances, I will leave the possibility of an amendment to be considered in a separate motion for leave if future events entitle the plaintiff to go down that road. The motion may be made in writing if all parties consent to the terms of the order.

[77] For this purpose, I should add that I am not satisfied that the reasons of the court in *Chapman* for refusing the defendant's request for leave to apply for a declaration of the kind referred to in *British Columbia Ferry* are equally applicable for the purposes of the *Negligence Act*. I am not sure that the degree of fault to be attributed to a defendant can be determined without considering that attributable to each of any other potential tortfeasors whose negligence or fault contributed to the totality of the plaintiff's damages: see *Renaissance*; and *Martin* on this point.

[78] I note further that, if the statement of claim in *Taylor* is to be amended to limit the Crown's potential liability by reference to the relative degree of fault to be attributed to it, the

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implications of this may have to be considered at the hearing of the motion to certify the proceeding. It could possibly have some bearing on the formulation of the common issues, and on the manageability of the proceedings if the relative degrees of fault of the persons who contributed to the damages of each of the class members would need to be determined as individual issues. I express no opinion on these questions at this stage.

[79] These motions will be dismissed.

4. The plaintiff's motion to stay or sever the third party proceedings.

[80] The motion to sever, or stay, the third party proceedings is, of course, moot in view of my decision to strike the statement of claim. As it was fully argued, I will provide my provisional views on it.

[81] The plaintiff's motion was premised on a finding that the motion of the third parties to strike the third party claims would be denied. This has occurred, at least for the time being.

[82] In the submission of Mr Baert, the participation of the third parties in the action between the plaintiff and the defendant is not required and it will unduly delay and complicate the proceedings. He referred me to three cases in which judges of this court have suggested that third parties should not normally be involved in certification motions and have doubted whether they would have standing for this purpose: *Ward-Price v. Mariners Haven Inc.*, [2002] O.J. No. 4260 (S.C.J.), para 24; *Attis v. Canada* (2005), 75 O.R. (3d) 302 (S.C.J.), para 14; and *Baxter v. Canada*, [2006] O.J. No. 2165 (S.C.J.), para 16. I am in general agreement with the views of the learned judges in those cases but see no reason why I should go further at this stage and require a separate action for contribution to be brought, or order a stay until the final disposition of the claims of the plaintiff against the defendant. The question whether these more extensive orders should be made should, I believe, most appropriately be left until any motion to certify the proceedings has been heard. If the proceeding is certified, the Crown might well seek to increase the number of potential third parties and there could be issues affecting its ability to do this. In consequence, if the question was not moot, I would be inclined to make an order staying the third party proceedings only until the final disposition of the motion to certify the proceedings, subject to any earlier order of the court. I would have granted the motion to this extent.

5. Costs

[83] Written submissions on the costs of these motions may be made within 14 days of the release of these reasons.


CULLITY J.

Released: July 17, 2007

COURT FILE NO.: 06-CV -307254 CP
DATE: 20070717

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Kevin Drady

Plaintiff

- and -

Her Majesty the Queen in Right of Canada as
represented by the Minister of Health, 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, Dr. A. K. Wyllie

Third Parties

REASONS FOR DECISION

CULLITY J.

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COURT FILE NO.: 99-CV-181819 CP

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Kathryn Anne Taylor

Plaintiff

- and -

Her Majesty the Queen in Right of Canada as
represented by the Minister of Health, the Attorney
General for Canada

Defendant

- and -

University Health Network (formerly
Toronto General Hospital), Dr. W. Dobrovolsky

Third Parties

REASONS FOR DECISION

CULLITY J.

Released: July 17, 2007