CITATION: Barbiero v. Pollack, 2024 ONSC 1548
COURT FILE NO.: 03-CV-243858CP
DATE: 20240314

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SUPERIOR COURT OF JUSTICE - ONTARIO

BETWEEN: ANNA BARBIERO, Plaintiff

AND:

DR. SHELDON VICTOR POLLACK, Defendant

BEFORE: Justice Glustein

COUNSEL: *Peter L. Roy and J. Adam Dewar,* for the plaintiff

Rebecca Jones and Meghan S. Bridges, for the defendant

HEARD: February 29, 2024

REASONS FOR DECISION

NATURE OF THE MOTION AND OVERVIEW

[1] The defendant, Dr. Sheldon Victor Pollack ("Dr. Pollack"), brings this motion under s. 35 of the *Class Proceedings Act,* 1992, S.O. 1992, c. 6 ("*CPA*") and Rule 24.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to dismiss this class action for delay.

[2] This action arises out of the alleged injection of "Injectable Grade Liquid Silicone" ("IGLS") or "Liquid Injectable Silicone" ("LIS")[1] by Dr. Pollack into patients' lips to provide permanent contour improvement. The representative plaintiff, Anna Barbiero ("Barbiero"), is one of 369 patient class members.[2]

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[1] The plaintiff does not accept that the product used by Dr. Pollack contained "injectable grade" liquid silicone (which Dr. Pollack asserts is a "medical grade" product). Instead, the plaintiff defines the product as LIS. I refer to the product in these reasons as IGLS since the certification order uses that term. I make no finding on whether the silicone product was "injectable grade" or "medical grade". The definition is not material as both parties agree that whether labelled IGLS or LIS, either reference is to the actual product used by Dr. Pollack.

[2] There are also class members who bring *Family Law Act*, R.S.O. 1990, c F.3 claims, but Barbiero's counsel ("Class Counsel") could not provide the court with a definitive number. In any event, those claims are derivative and as such the issues on this motion focused on the claims of the patient class members.

[3] The class alleges that Dr. Pollack breached the standard of care. The class alleges that (i) Dr. Pollack used an "untested, unsanctioned and unlabelled product of unknown composition that he had obtained through an unauthorized and highly suspect source"; (ii) regardless of whether the IGLS was an adulterated or a Dow Corning liquid silicone product, neither was approved for use in Canada for the lip augmentation procedure conducted by Dr. Pollack; (iii) Dr. Pollack failed to warn the patient class members of the risks of the procedure; and (iv) Dr. Pollack failed to obtain informed consent from the patient class members. The class further alleges that by the above conduct, Dr. Pollack committed the tort of battery against the patient class members.

[4] The class alleges that as a result of Dr. Pollack's conduct, they suffered "serious physical injury and emotional distress", which exposed them to "serious, life-threatening illnesses", including "migration of the LIS from the site of injection to other parts of the body, inflammation and discolouration of surrounding tissue, formation of granulomas, soft tissue tumours, connective tissue disorders and cognitive impairment".

[5] The issue before the court on the present motion is whether the class action should be dismissed for delay. The settled law from *Langenecker v. Sauvé*, 2011 ONCA 803, 286 OAC 268 is that an action will be dismissed for delay where the delay (i) is "inordinate", (ii) is "inexcusable", and (iii) results in a "substantial risk that a fair trial of the issues in the litigation will not be possible because of the delay", whether through an unrebutted presumption of prejudice or by evidence of actual prejudice to the defendant's ability to have the case adjudicated on its merits.

[6] For the reasons that follow, I dismiss the class action for delay under the *Langenecker* test. I find that:

(i) The overall delay of 21 years from the commencement of this action is inordinate;

(ii) The delay has not been explained. There is no explanation for (a) the more than six year period from (1) May 24, 2006 (when the plaintiff last attempted to obtain a sample of product used by Dr. Pollack from Health Canada,[3] so that the parties could test the IGLS Sample for its composition) until (2) mediation on December 10, 2012 and (b) the seven year period from (1) the December 2012 mediation until (2) a December 20, 2019 letter from Class Counsel to Dr. Pollack's counsel, advising that they wished to "arrange to have the [IGLS Sample] tested" and intended to set the action down for trial.

[3] In these reasons, I define the IGLS seized by Health Canada from Dr. Pollack as the "IGLS Sample".

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(iii) The plaintiff has not rebutted the strong presumption of prejudice arising from the lengthy delay.

The plaintiff relies on examination for discovery evidence that relates to Dr. Pollack's conduct and submits that based on the transcript, the action could be tried without prejudice to Dr. Pollack. However, Dr. Pollack asserts that he believed (i) the IGLS was a Dow Corning product and (ii) in any event, the IGLS was not harmful to his patients. The discovery evidence supports the presumptive prejudice since testing of the IGLS Sample would be a basis to defend the common issue of the composition of the IGLS at trial. The plaintiff led no evidence to rebut the strong presumption of prejudice.

In addition, there is a strong presumption that memories fade, witnesses are unavailable, and records would be lost over time.[4] The plaintiff led no evidence to rebut the strong presumption of prejudice that Dr. Pollack would face significant risk in defending individual issues of causation and damages.[5]

(iv) Even if the plaintiff rebutted the presumption of prejudice (which I do not find), Dr. Pollack led evidence of actual prejudice to his defence. The IGLS Sample which had been in the possession of Health Canada and was available for testing is now lost. Dr. Pollack can no longer conduct testing of that sample to respond to the plaintiff's claim that the IGLS product he used on his patients (i) was unsafe for use and (ii) was an adulterated product not manufactured by Dow Corning.

The plaintiff asserts that even if the IGLS was a Dow Corning product, it was not safe for use. However, the allegations of negligence and battery also arise from the alleged use of an adulterated product, for which the inability to test the IGLS Sample is prejudicial. Further, the inability to test the IGLS Sample also prejudices Dr. Pollack's defence that the IGLS product he used does not and cannot cause the injuries claimed by the patient class members.

[7] I also do not accept the plaintiff's submission that the court should not dismiss a certified action for delay because (i) there is no precedent to do so, and (ii) "[c]lass proceedings are subject to a robust case management system and any concerns the Defendant has about the pace

[4] While Dr Pollack's evidence is that he has kept all relevant medical records of his patients, there is no evidence from the plaintiff that medical records are available for the class members.

[5] The issue of whether patients could provide informed consent to a claim of battery or breach of the standard of care in using IGLS is a common issue, so individual informed consent claims may not be required after a common issues trial.

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at which this action progressed can be addressed through that process without resorting to a remedy as extreme as a dismissal order".

[8] Section 35 of the *CPA* is clear that the *Rules of Civil Procedure* apply to proceedings under the *CPA*. Given the "robust case management" under the *CPA*, it is not surprising that there have not been any reported decisions dismissing a certified class action for delay. However, where (i) a certified class action is more than 21 years old and sits dormant without explanation for at least 12 to 13 years; (ii) liability depends on the composition of the IGLS and damages and causation issues arising from events up to 33 years ago; and (iii) the delay results in the loss of a sample which would have been relevant to those liability, damages and causation issues, a motion to dismiss under Rule 24.01 is the appropriate mechanism to address that delay.

[9] The plaintiff further submits that there is little or no practical effect to the present motion because a new representative plaintiff could bring a new proposed class action. Limitation periods are suspended under s. 28(3) of the *CPA* upon the commencement of a class proceedings. The plaintiff submits that Dr. Pollack would then be required to defend a new class action with the same loss of the IGLS Sample and the same risk of worsening memories or loss of documents.

[10] Dr. Pollack submits that a court on a subsequent certification motion could take actual or presumed prejudice into account.

[11] I do not decide that issue as it may be addressed when or if a new class action is brought before the court.

[12] Further, issues such as whether (i) the ultimate limitation period under s. 15 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, applies and (ii) any new class action may meet the new legislative requirements for certification under s. 5(1.1) of the *CPA* (which were not in effect at the 2003 consent certification) do have practical effect. These issues may need to be determined by the court if a new class action is brought.

FACTS

[13] I first review the background of the class action. I then review the evidence on this motion relating to (i) the steps taken in this action, (ii) the loss of the IGLS Sample, and (iii) the evidence from the examinations for discovery of Dr. Pollack.

Background of the class action

[14] This is a medical negligence class action against Dr. Pollack, a dermatologist registered with the College of Physicians and Surgeons of Ontario ("CPSO") since April 17, 1989.

[15] Between August 1990 and the early 2000s, Dr. Pollack used IGLS as filler for intradermal injections to offer permanent contour improvement to patients' lips (also referred to as "lip augmentation").

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[16] In February 2003, Barbiero brought this action on behalf of all individuals who were patients of Dr. Pollack and who received injections of IGLS, and their living *Family Law Act* relations.

[17] In her claim, Barbiero alleges that:

(i) The IGLS used by Dr. Pollack was an "untested, unsanctioned and unlabelled product of unknown composition that he had obtained through an unauthorized and highly suspect source. Dr. Pollack injected into these patients a substance he knew, or ought to have known, had not been given clinical approval by Health Canada".

(ii) Dr. Pollack breached the standard of care of a reasonable physician at the time, and engaged in the tort of battery, in his treatment of the class members.

(iii) Dr. Pollack failed to warn the class members of the risks of using IGLS for cosmetic surgery and failed to obtain their informed consent.

(iv) The injuries caused by the IGLS were "serious" and "life-threatening" and included "migration of the [IGLS] from the site of injection to other parts of the body, inflammation and discolouration of surrounding tissue, formulation of granulomas, soft tissue tumours, connective tissue disorders and cognitive impairment", causing pain and suffering, nervous shock, loss of income, impairment of earning ability, future care costs, medical costs, loss of amenities and enjoyment of life, and out of pocket expenses".

[18] Barbiero claims that following her treatment by Dr. Pollack, she suffered severe fatigue, anxiety, depression and other mental health problems, hair loss, frequent migraine headaches, blurred vision, and uterine hemorrhaging.

[19] Dr. Pollack denies all the allegations. Dr. Pollack pleads that:

(i) There was no legal restriction on the use of IGLS for intradermal injections, and in any event, he was not aware of any legal restriction on the use of IGLS in the practice of medicine at the relevant time.

(ii) It was his standard practice to explain carefully to each patient the nature, risks and effect of possible complications of IGLS.

(iii) It was his standard practice to inform each patient about the status of IGLS for sale, distribution and use in Canada, and specifically that IGLS was not approved for sale or distribution in Canada, and so he obtained it from a source outside of Canada.

(iv) The class members did not sustain the injuries alleged.

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(v) None of the illnesses the class members may have sustained or allegedly are at risk of sustaining were caused or in any way contributed to by the IGLS.

[20] The class action was certified by Justice Cullity on December 11, 2003, on consent. There are 369 patient class members after opt-outs. The class is divided into the following three groups, cited *verbatim* from the certification order which refers to the groups as A and B (the patient class members), and group C (the *Family Law Act* claimants):

A. All persons who were patients of Dr. Pollack between August 1990 and May 8, 1999 and who received injections of Injectable Grade Liquid Silicone ("IGLS") from Dr. Pollack, or where such a person is deceased, the personal representative of the estate of the deceased person; (Persons included in this paragraph A are hereinafter referred to as "Group 1 Patients");

B. All persons who were patients of Dr. Pollack from May 9, 1999 onward who received injections of IGLS from Dr. Pollack, or where such a person is deceased, the personal representative of the estate of the deceased person; (Persons included in this paragraph B are hereinafter referred to as "Group 2 Patients");

C. All living parents, grandparents, children, grandchildren, siblings, spouses and same sex partners (within the meaning of s. 61 of the *Family Law Act*) of Group 1 Patients and Group 2 Patients, or where such a family member is deceased, the personal representative of the estate of the deceased family member. (Persons included in this paragraph C are hereinafter referred to as "Family Law Claimants").

[21] In the certification order, Justice Cullity certified the following common issues (cited *verbatim*):

1. Was the use of Injectable Grade Liquid Silicone ("IGLS") in the treatment of the class members prohibited by law?

2. If the answer to question one is "yes", is the defence of consent to an individual claim of battery still available to the defendant?

3. During class periods I and/or II,[6] what is the applicable duty of care in using IGLS in the treatment of class members?

[6] Class periods I and II correspond to the Group 1 and Group 2 patients respectively.

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4. If the answer to question one is "yes", is the defence of consent available to Dr. Pollack with respect to the allegations of breaches of the applicable duty of care?

5. During class periods I and/or II, did Dr. Pollack breach the applicable duty of care in using IGLS in the treatment of the class members?

6. If it is established that Dr. Pollack committed battery and/or breached the applicable duty of care:

   (a) are the class members entitled to a punitive damage award in either class period; and

   (b) if the class members are entitled to a punitive damage award in either class period, what is the appropriate amount of a punitive damage award in either class period I and/or II?

Evidence on the present motion

[22] Dr. Pollack filed affidavit evidence from (i) a law clerk who attached relevant correspondence and documents and (ii) Mark Bailey ("Bailey"), a representative of Health Canada who provided evidence as to the (a) communications between Health Canada and Class Counsel about testing the IGLS Sample and (b) the loss of the IGLS Sample.

[23] The plaintiff only filed evidence from a legal assistant who attached the transcripts from the examinations for discovery of Dr. Pollack and Barbiero in the class action. The plaintiff filed no evidence for this motion which addressed the delay.

[24] The plaintiff relies on affidavit evidence from Sean Grayson ("Grayson"), a partner at Class Counsel's law firm. The Grayson affidavit was filed in support of a motion brought by the plaintiff in July 2022 to amend the March 9, 2005 order which provided for testing of the IGLS Sample, referred to as the "March 2005 Order" (discussed at paras. 35-37 below).

[25] A law clerk for Dr. Pollack's counsel attached the Grayson affidavit as an exhibit to her affidavit. At the hearing, all counsel agreed that the court could consider the Grayson evidence even though it was not filed directly by Grayson for this motion.

[26] Grayson outlines steps taken by Class Counsel (i) between 2004 and 2006 to obtain a sample of Dow Corning 360 Medical Fluid from Dow Corning to test against the IGLS Sample and (ii) and steps taken to find another company to test the IGLS Sample in 2020 to 2022 "in an effort to bring this matter to trial with the proper evidence".

[27] Grayson provides no evidence as to any steps taken between 2006 and 2020, other than a mediation in December 2012 as discussed at para. 45 below.

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[28] I now review the evidence on this motion relating to (i) the steps taken in this action, (ii) the loss of the IGLS Sample, and (iii) the evidence from the examination for discovery of Dr. Pollack and Barbiero.

Steps taken in this action

(i) Steps from the December 11, 2003 certification order until May 24, 2006 when Class Counsel understands that testing a Dow Corning IGLS Sample is not possible

[29] I review the procedural steps taken between December 11, 2003 (the date of certification) and May 24, 2006 (when Grayson states that Class Counsel "came to the understanding" that they would not be able to obtain the Dow Corning IGLS sample for testing).

[30] Dr. Pollack delivered his statement of defence on February 17, 2004. Barbiero delivered a reply on March 4, 2004.

[31] Notice of certification was delivered to the class members in the spring of 2004. Following the identification of additional class members, a second round of notices was sent in 2005. As noted at para. 2 above, the class, after opt-outs, includes 369 patient members and an undetermined number of *Family Law Act* claimants.

[32] Following the close of the opt-out period, the parties exchanged affidavits of documents and conducted their respective examinations for discovery. Dr. Pollack was examined for discovery on July 19 and 20, 2004. Barbiero was examined for discovery on July 21, 2004.

[33] After certification, Barbiero sought to test the IGLS Sample. The purpose of the proposed testing was to confirm whether the sample seized by Health Canada (see para. 68 (xxiii) below) is Dow Corning liquid silicone as claimed by Dr. Pollack, an adulterated form thereof, or some other product.

[34] On September 15, 2004, counsel for Dr. Pollack advised Class Counsel that Dr. Pollack did not oppose testing the IGLS Sample, but wanted to ensure the expert hired by Class Counsel was qualified to "take possession of the sample and separate it into smaller samples" so that one of those smaller samples could be tested by Dr. Pollack's expert.

[35] On March 9, 2005, Justice Cullity, on a motion brought by the plaintiff with the consent of Dr. Pollack and Health Canada, made an order requiring Health Canada to deliver the IGLS Sample to Class Counsel's expert on certain terms (the "March 2005 Order").

[36] Pursuant to the March 2005 Order, on a date to be mutually agreed, Health Canada would deliver the IGLS Sample to Dr. Hillar Asuki of Bodycote Materials Testing Canada Inc. ("Bodycote"), who was acting as an expert for Barbiero. On receipt of the IGLS Sample, Bodycote was to divide the sample under laboratory-controlled conditions (in the presence of an expert to be retained by Dr. Pollack) into three parts: samples "A" and "B" were to be equal and

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in amounts not less than 1 ml of the IGLS Sample, and sample "C" was to consist of the remaining volume of the IGLS Sample.

[37] Bodycote would retain sample "A" for the purpose of performing tests and analysis as directed by Class Counsel. Bodycote was to forward sample "B" to counsel for Dr. Pollack. Sample "C" was to be sealed and stored as counsel may agree or the court may direct.

[38] The testing did not proceed. Barbiero was not able to obtain a control sample of liquid silicone to test against the material seized by Health Canada.

[39] Grayson's evidence is that by May 24, 2006, Class Counsel "came to the understanding" that Dow Corning refused to provide Barbiero, or a laboratory engaged by Barbiero or any other person, with a sample of Dow Corning Brand IGLS to use as a control for the tests.

(ii) Steps from discovering that testing of a Dow Corning sample was not possible on May 24, 2006 until the mediation on December 10, 2012

[40] There is no evidence of any steps taken by Barbiero to advance the action during this six and a half year period, other than requesting a new case management judge five and a half years after becoming aware that testing of a Dow Corning sample was not possible.

[41] On May 7, 2008, counsel for Dr. Pollack wrote to Class Counsel to inquire about the status of the action:

> When we last spoke, which my file indicates was quite some time ago, you told me that you were in the process of bringing a motion against Dow Corning in the US to obtain production of a sample of IGLS to use as a reference standard to test the IGLS sample in the hands of Health Canada.
>
> As you know, the Order of the Honourable Mr. Justice Cullity dated March 9, 2005, sat [*sic*] out a very specific process that must be followed for the removal, division and testing of the remaining sample of IGLS by both parties. I would be grateful if you would let me know whether your clients intend to proceed with this action.

[42] Class Counsel responded to this letter on May 14, 2008 to advise that their firm was undergoing a reorganization and they intended to proceed with this action. Class Counsel said nothing about the testing of the IGLS Sample.

[43] Over three and a half more years passed, with no contact from Class Counsel.

[44] On December 21, 2011, Barbiero requested the appointment of a new case management judge due to the retirement of the Justice Cullity. On January 10, 2012, Justice Horkins was assigned as the case management judge of this proceeding.

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[45] In late 2012, the parties agreed to attend mediation. On December 10, 2012, the mediation proceeded before Mr. William Horton but did not resolve the case.

(iii) Steps from the December 10, 2012 mediation until December 19, 2019

[46] There is no evidence of any substantive steps taken by Barbiero during this time period.

[47] In January 2013, Class Counsel and counsel for Dr. Pollack agreed to postpone what was to be a further call with Mr. Horton to allow time for Class Counsel to collect more information. That information included (i) the identity of additional patients who intended to participate in the action, beyond those who had already consented to the release of their medical charts, and (ii) which class members were alleged to have suffered actual harm.

[48] On October 23, 2013, Class Counsel advised counsel for Dr. Pollack that Barbiero had received funding from the Class Proceedings Fund. This letter said nothing about the additional information Class Counsel promised at the mediation or about contacting Health Canada to arrange transfer of the IGLS Sample to Bodycote.

[49] Over the next six years, Class Counsel took no substantive steps to advance this litigation. Counsel for Dr. Pollack sent numerous letters and emails to Class Counsel asking, among other things, for the information promised at the 2012 mediation. Class Counsel responded to only some of these letters in 2015 and 2016. These replies were not substantive and did not advance the action.

[50] For three years between 2017 and 2019, Class Counsel did not respond to any letters from counsel for Dr. Pollack.

(iv) Steps taken from December 20, 2019 when Class Counsel advised Dr. Pollack of Barbiero's intention to bring a motion to amend the March 2005 Order and set the action down for trial until the present

[51] On December 20, 2019, Class Counsel wrote to counsel for Dr. Pollack advising that they wished to "arrange to have the sample of the silicone tested as per the previous order of Cullity J.". Class Counsel advised Dr. Pollack's counsel of the plaintiff's intention to set the matter down for trial.

[52] On January 13, 2020, counsel for Dr. Pollack responded by asking Class Counsel for (i) the information they had been requesting from the mediation for the past seven years, which Class Counsel had not yet provided, and (ii) the steps Class Counsel proposed to take to arrange for testing of the IGLS Sample.

[53] From 2020 to 2022, Class Counsel made efforts to arrange for the testing of the IGLS Sample. Due to the Covid 19 pandemic some laboratories stopped responding to enquiries. It remained very difficult to obtain a control sample of Dow Corning IGLS to compare to the IGLS Sample.

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[54] On May 10, 2021, Class Counsel asked for consent to amend the March 2005 Order. This letter did not provide a substantive response to the questions asked in the letter dated over a year earlier (on January 13, 2020) from counsel for Dr. Pollack.

[55] In February 2022, Class Counsel found a laboratory that was able to secure a control Dow Corning sample and the testing could proceed.

[56] On July 28, 2022, Class Counsel served a motion record to amend the terms of the March 2005 Order. The motion record included the Grayson affidavit summarized at paras. 24-27 above.

[57] In September, 2022, the parties were advised that I had been assigned as the new case management judge. On September 27, 2022, in advance of a case conference to be held on September 29, 2022, counsel for Dr. Pollack served his notice of motion to dismiss the action for delay. At the case conference on September 29, 2022, I ordered that Class Counsel's motion to amend the March 2005 Order proceed first, followed by this motion to dismiss for delay.

[58] Health Canada subsequently advised the parties that, among other things, it could not locate the IGLS Sample and believed it to be lost (as discussed in more detail at para. 67 below).

[59] Following that advice from Health Canada, Barbiero took additional steps to locate the IGLS Sample. Barbiero retained a skip tracer to locate the former Health Canada employee who last had custody of the IGLS Sample. Those efforts were unsuccessful.

[60] On October 18, 2022, counsel for Dr. Pollack emailed Class Counsel to advise they had learned from Health Canada that the IGLS Sample could not be located and that all means of attempting to locate it had been exhausted.

[61] On November 3, 2022, Class Counsel advised they were following up with Health Canada to obtain more information.

[62] Between November 3, 2022 and March 13, 2023, counsel for Dr. Pollack sent numerous emails to Class Counsel about whether they would be abandoning the motion to amend the March 2005 Order, in light of the information that Health Canada no longer had the IGLS Sample. Counsel for Dr. Pollack asked Class Counsel to schedule the motion to amend the March 2005 Order if it would not be abandoned. I scheduled that motion to be heard on July 10, 2023.

[63] Counsel for Dr. Pollack sent several emails between March and June, 2023 attempting to set a timetable for the exchange of materials on Barbiero's motion to amend the March 2005 Order. Class Counsel did not provide a substantive response to these scheduling emails. On June 15, 2023, Class Counsel advised they would not proceed with their motion to amend the March 2005 Order because Health Canada had been unable to locate the IGLS Sample, and without a sample to test, "it seem[ed] obvious" the motion could not proceed.

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[64] Dr. Pollack's motion to dismiss the class action was then scheduled. I heard the present motion on February 29, 2024.

Evidence from Health Canada about its communications with Class Counsel and the loss of the IGLS Sample

[65] Bailey is a Supervisor at Health Canada in the Medical Devices Compliance Verification Central 2 Unit. As noted at para. 22 above, he swore an affidavit on this motion.

[66] Bailey reviewed the efforts of Health Canada following the March 2005 Order to correspond with Class Counsel about when Health Canada could deliver the IGLS Sample to Class Counsel. On two occasions in 2005 and 2006, Class Counsel informed Health Canada that they would "get back to" Health Canada about when the IGLS Sample should be delivered.

[67] The uncontested evidence of Health Canada's possession and search for the IGLS Sample is:

(i) Kent Brown of Health Canada assumed control of the IGLS Sample on August 10, 2004.

(ii) Mr. Brown retired from Health Canada in April 2015. Mr. Bailey's efforts to locate him to inquire about the IGLS Sample were unsuccessful.

(iii) Mr. Bailey conducted an exhaustive search of Health Canada's records for both the IGLS Sample and the contact information of Mr. Brown, the last person known to be in possession of the IGLS Sample.

(iv) There are no other means at Health Canada's disposal to locate the IGLS Sample. To the best of Mr. Bailey's knowledge, Health Canada is no longer in possession of the IGLS Sample.

Evidence from the examinations for discovery

[68] The plaintiff set out in detail evidence from the examination for discovery of Dr. Pollack that addressed his potential liability in negligence, battery, and for lack of informed consent. I summarize the evidence from Dr. Pollack's examination for discovery as follows:

(i) Dr. Pollack is a dermatologist registered with the CPSO since April 17, 1989.

(ii) While in the United States, Dr. Pollack learned of the use of IGLS from two physicians, Dr. Stephen Mandy and Dr. Norman Orentreich, both of whom were prosecuted for their use of IGLS in the United States.

(iii) In the early to mid-1980s, Dr. Pollack asserts that he made some investigations into the legalities of using IGLS after which he began using it for cosmetic

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surgery in approximately 1987 to correct scarring, wrinkles and other cosmetic issues. Since that time, until shortly before this action was issued, he regularly used it on patients for the purposes of cosmetic surgery.

(iv) IGLS is classified by Health Canada as a medical device (i.e., not a drug or pharmaceutical product). Health Canada regulates, tests and authorizes the use of all drugs and devices intended for medical use. Prior to approval, a manufacturer must conduct rigorous testing and clinical trials to demonstrate safety and efficacy.

(v) Health Canada has never authorized IGLS for "sale or distribution" in Canada for cosmetic surgery or procedures, such as wrinkle reduction or lip augmentation. Health Canada includes medical use for cosmetic surgery in its definition of "sale or distribution".

(vi) The United States Food and Drug Administration (USFDA) has similarly taken a position that IGLS is not approved for commercial use.

(vii) Since at least 1990, Dow Corning liquid silicone sales literature includes a warning that states: "This Fluid is not approved by the [US]FDA for tissue augmentation and Dow Corning does not support this use".

(viii) In November 1992, the CPSO published an article, received and reviewed by Dr. Pollack, in College Notices under the headline "ON ALERT", stating that "the sale or use of liquid injectable silicone for micro-injections may constitute the sale or use of a non-compliant medical device, which is unlawful" and "[a]ny physician involved in such sale or use contrary to the law may be guilty of professional misconduct".

(ix) Collagen and Artecoll were alternative injectables that could be used in cosmetic surgery. They are less permanent and more expensive than IGLS. Health Canada approved Collagen for sale and distribution in and around 1981, and approved Artecoll in 1997.

(x) Dr. Pollack denies that there was a legal restriction on the use of IGLS for intradermal injections. Although Dr. Pollack knew that Health Canada prohibited the sale and distribution of IGLS, he claims that he did not know that this included a prohibition on medical use of the product until his discussions with Health Canada in May 1999.

(xi) Dr. Pollack did not purchase his supply of what he purported to be IGLS from a conventional distributor of medical products. According to Dr. Pollack, he was referred to his source of IGLS by Dr. Mandy (a physician prosecuted for his use of IGLS in the United States).

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(xii) Dr. Mandy told Dr. Pollack that his source of IGLS was Terple Industries ("Terple"), who distributed the IGLS using a post office ("P.O.") box in Florida. Dr. Pollack did not know where the product was manufactured, nor did he make inquiries about its source. Dr. Pollack had previously never heard about Terple.

(xiii) Dr. Pollack believed that Terple may have been structured to skirt U.S. laws regarding the distribution of IGLS.

(xiv) Dr. Pollack began using Terple as his sole source of IGLS. Although the company did not have a website, phone number or longstanding reputation, Dr. Pollack submitted an order for IGLS by writing a letter and mailing it to Terple's P.O. box.

(xv) Dr. Pollack's supply of IGLS arrived in an unlabelled cardboard box. The box contained a clear and unlabelled glass bottle of 100 ml of fluid purported to be IGLS.

(xvi) When he received his first shipment, Dr. Pollack deposed that he asked someone in the physics department of Duke University to test if it was in fact IGLS, as well as its purity and viscosity. Dr. Pollack received at least four shipments, but only the first was tested to confirm that it was in fact IGLS.

(xvii) Dr. Pollack did not have a telephone number or contact person for Terple. His only means of communicating with Terple was using the P.O. box.

(xviii) The IGLS product obtained by Dr. Pollack had no expiry date and did not need to be refrigerated. Dr. Pollack stored the unlabeled bottles in a cabinet in his medical office.

(xix) Dr. Pollack states that he thought the IGLS was a Dow Corning product. He knew that Dow Corning did not approve of its use for tissue augmentation.

(xx) Dr. Pollack sold IGLS to his patients[7]. Dr. Pollack would sometimes give patients a scientific article he wrote that emphasized the benefits of IGLS. Dr. Pollack would advise those patients to take the article home and read it. He did not review this article with his patients or provide any other unbiased material.

[7] Dr. Pollack purchased IGLS for approximately $7 per cc and resold it to the patient class members for approximately $374.50 per cc, a markup of 5,250 per cent.

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(xxi) Health Canada received a complaint that Dr. Pollack was using IGLS for cosmetic purposes. On May 3, 1999, Health Canada advised Dr. Pollack that it was illegal to distribute IGLS in Canada, and that the use of IGLS was included in the definition of distribution. Dr. Pollack was instructed to stop using IGLS.

(xxii) On May 8, 1999, Dr. Pollack wrote a letter to Health Canada and certified that he had discontinued using IGLS for the treatment of his patients.[8]

(xxiii) On May 31, 1999, Health Canada attended at Dr. Pollack's office and confiscated what was then believed to be his remaining IGLS.

(xxiv) Unbeknownst to Health Canada, Dr. Pollack retained 200 ml of liquid silicone in his home. Dr. Pollack did so because he anticipated that Terple might "disappear".

(xxv) A few weeks after Health Canada confiscated Dr. Pollack's remaining IGLS and after he certified that he would stop using it, Dr. Pollack brought some of his supply of IGLS into his medical office so he could continue using it on patients.

(xxvi) Dr. Pollack continued to regularly inject patients with IGLS after May 8, 1999.

(xxvii) Dr. Pollack did not indicate the use of IGLS on patients' charts but charted that the patients had received Artecoll instead of IGLS.

(xxviii) In 2001, Health Canada discovered that Dr. Pollack was still using IGLS. After being discovered by Health Canada for the second time, Dr. Pollack poured the rest of his supply of IGLS into the garbage.

[69] Barbiero also relies on her evidence on examination for discovery that:

(i) Between 1998 and 2001, Barbiero received IGLS injections on approximately five occasions.

(ii) While injecting Barbiero on her last attendance, Dr. Pollack told Barbiero that Health Canada had told him that he could not use IGLS anymore, and that the alternative is Artecoll, which is more expensive. Dr. Pollack told Barbiero that the IGLS injection was a secret between the two of them. He subsequently wrote on Barbiero's chart that she received "Artecoll 0.5 to lips upper greater than lower".

[8] The two proposed class periods for patients are based on the periods before and after the May 8, 1999 letter.

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ANALYSIS

[70] The plaintiff submits that the court should dismiss the motion because:

(i) Dr. Pollack has not met the test for dismissal for delay based on the evidence before the court and the applicable law.

(ii) Even if Dr. Pollack has met the test for dismissal for delay, the court should not exercise its jurisdiction to make an order dismissing the present class action for delay because such order would have no practical effect.

[71] For the reasons that follow, I reject each of the above submissions and dismiss the class action for delay.

Issue 1: Whether the test for dismissal for delay is met on the evidence before the court

[72] It is settled law that the *Langenecker* test applies to the present motion. I review each of the *Langenecker* requirements below.

Whether the delay is inordinate

[73] I first review the applicable law and then apply the law to the facts of the present case.

(i) The applicable law

[74] In *Langenecker*, Sharpe J.A. held that "the inordinance of the delay is measured simply by reference to the length of time from the commencement of the proceeding to the motion to dismiss": at para. 8 (see also: *Sickinger v. Krek*, 2016 ONCA 459, at para. 30).

[75] Consequently, starting the clock for delay at another point in time "is not the test that has been endorsed by the Court of Appeal": *NWG Investments Inc. v. Fronteer Gold Inc.*, 2023 ONSC 4826 at para. 27.

[76] There is no set amount of time that will make a delay qualify as "inordinate". The court in *Langenecker* held that a 15-year delay was inordinate. Sharpe J.A. stated, at para. 6:

> It is fair to say that many medical malpractice actions are among those cases that move slowly. However, even accepting that litigation customarily moves at a somewhat stately pace and that this kind of litigation can move even more slowly than most, **there can be no doubt that 15 years from the commencement of the action to the motion to dismiss constitutes inordinate delay**. [emphasis added]

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[77] In *Tanguay v. Brouse*, 2010 ONCA 73, 184 A.C.W.S. (3d) 975, the court upheld a motion judge's decision to dismiss an action for delay where the action was commenced in 1991 and the motion was brought in 2009, resulting in a delay of 18 years: at paras. 1, 5.

[78] Other courts have found delays of five to seven years to be inordinate: *Mugizi v. Ngo*, 2022 ONCA 595, at paras. 2, 7-8; *Sterling Waterhouse Inc. v. Cohen*, 2022 ONSC 3950, at para. 15.

[79] The plaintiff has provided no case law where the delay was not found to be inordinate after a 21-year delay period from commencement of the action (nor any case law where the delay was not held to be inordinate if beyond the 15-year period in *Langenecker* or the 18-year period in *Tanguay*).

[80] The plaintiff relies on cases which were not dismissed because the presumption of prejudice was rebutted, and no actual prejudice was found.

(ii) Application of the law to the present case

[81] The plaintiff acknowledges that "this action has [not] moved as quickly as it could have" but submits that "if the length of delay is to be considered, it should be assessed from some reasonable period of time following the mediation to the date of the Plaintiff's proposal to vary Justice Cullity's Order to test the silicone sample held by Health Canada".

[82] I do not agree.

[83] As I discuss at paras. 74-75 above, the applicable test to determine whether a delay is "inordinate" runs from commencement of the action, not from a different time. The 21-year delay in the present case is inordinate under any of the cases before the court, including *Langenecker*.

[84] Further, while the plaintiff's acknowledgement that the action did not proceed "as quickly as it could have been" is not a formal concession, the plaintiff does not submit that the delay was not inordinate. At a minimum, the plaintiff acknowledges that a 21-year delay is significant.

[85] Even under the plaintiff's proposal to start the time period from mediation (which I do not accept), there is at least a seven-year period from the mediation in December 2012 to December 2019, when Class Counsel advised of their intention to bring the motion to amend the March 2005 Order. No activity took place during that time to move the action forward. Lengthy periods of complete inactivity of four to five years were noted by the court in *Tanguay* as supportive of a finding of inordinate delay (a period of time less than the present case): at para. 1.

[86] For the above reasons, I rely on the settled law in *Langenecker* and *Tanguay* and find that the 21-year delay from the commencement of the class action is inordinate.

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Whether the delay is inexcusable

[87] I first review the applicable law and then apply the law to the facts of the present case.

(i) The applicable law

[88] Unless a credible excuse is given for the delay, the natural inference is that it is inexcusable and the defendants are likely to be seriously prejudiced by it: *Heffernan v. John H. Kieffer Professional Corporation*, 2021 ONSC 2786 at para. 53, citing *Saikaley v. Commonwealth Insurance Co. et al.*, (1978), 21 OR (2d) 629 (HC) at 633.

[89] Consequently, as the court held in *Sterling Waterhouse*, at para. 14, "where [the moving party has] shown that the delay is inordinate, the Plaintiff then bears an evidentiary burden to (i) provide a reasonable explanation for the delay and (ii) rebut the presumption of prejudice arising from the delay".

[90] The court in *Sickinger* set out the test to determine whether delay is inexcusable, at para. 30:

> A court should consider the reasons offered for the delay and whether those reasons provide an adequate explanation, with regard to the credibility of the explanations, the explanations for individual parts of the delay, the overall delay and the effect of the explanations considered as a whole.

(See also: *Ticchiarelli v. Ticchiarelli*, 2017 ONCA 1, 274 A.C.W.S. (3d) 525, at para.16).

[91] The COVID-19 pandemic may explain a small portion of a delay but does not necessarily excuse delay for the entire pandemic period. In *Paliani v. Laing*, 2022 ONSC 4832, the court noted that civil litigation was at a complete standstill due to the pandemic for only a brief period of time and cannot be used as an excuse for longer periods of delay. Verbeem J. held, at para. 52:

> Finally, the plaintiffs point to COVID-19 as a partial explanation for their delay. Unquestionably, the pandemic resulted in a delay of all civil matters in Ontario for a period of time. Regular court operations were suspended from March 2020 to July 2020. In early July, 2020, the court resumed regular operations albeit with some proceedings conducted virtually or on a hybrid basis. With the resumption of regular operations, the parties had the ability to bring a non-urgent motion in a civil proceeding for production of alleged relevant documentation, and the plaintiffs could have done so. They never did.

[92] Whether a class action is proposed or certified, it is not the obligation of the defendant to move the action forward. The plaintiff carries the primary responsibility of advancing their own case: *Wallace v Crate's Marine Sales Ltd.*, 2014 ONCA 671, 245 A.C.W.S. (3d) 72, at para. 18; *Sterling Waterhouse*, at para. 18.

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[93] While a defendant's conduct may be relevant to delay, a defendant who does "nothing to resist any attempt by the plaintiff to advance the action" cannot be compelled to take positive steps in the face of a plaintiff's inordinate and inexcusable delay. In *1196158 Ontario Inc. v. 6274013 Canada Limited*, 2012 ONCA 544, 112 OR (3d) 67,[9] Sharpe J.A. spoke for the court, at paras. 29-30:

> I agree that the conduct of a defendant may be relevant, especially where a plaintiff who tries to move an action along is faced with "some resistance" from the defendant, or tactics that are not "consistent with a willingness to see a relatively straightforward case proceed expeditiously".
>
> In this case, however, the defendants did nothing to resist any attempt by the plaintiff to advance the action. They cannot be accused of "lying in the weeds" and hoping to gain a tactical advantage. Failing any initiative on the part of the plaintiff, to require the defendants to spend time and money to prepare for a case that, from all appearances, was dead on the vine would, in my view, be to impose an unnecessary and unreasonable burden.

(ii) Application of the law to the present case

[94] The plaintiff filed no evidence to explain the 21-year delay. The affidavit of Class Counsel's legal assistant only attaches transcripts from the examinations for discovery.

[95] Further, the Grayson affidavit does not explain the delay. To the contrary, it supports Dr. Pollack's submissions that the overall delay is unexplained.

[96] Grayson addresses certain steps Class Counsel took up to 2006 to locate a Dow Corning sample to compare against the IGLS Sample. His affidavit then skips ahead 6 years to the December 2012 mediation and then 7 years to the steps taken in 2020 to locate another laboratory to test the IGLS Sample. Those delays are unexplained.

[97] Counsel for Dr. Pollack followed up with Class Counsel for updates throughout the litigation, and was frequently met with silence.

[98] For the above reasons, I find the delay to be inexcusable.

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[9] The decision in *1196158 Ontario Inc.* is about dismissal for delay at a status hearing under Rule 48.14, but its principles have been cited with approval in cases about dismissal for delay under Rule 24.01. See: *Shuttleworth v. Stephenson*, 2024 ONSC 245 at para. 22; *NWG Investments*, at para. 18; and *Paliani*, at para. 59.

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Prejudice

[99] I first review the law relevant to the requirement that the defendant suffer prejudice as a result of the delay (either through a presumption of prejudice or by the defendant establishing actual prejudice).

[100] I then apply the law to the facts of the present case.

(i) The applicable law

[101] Inordinate delay that is unexplained gives rise to a rebuttable presumption of prejudice because of the substantial risk that "a fair trial might not be possible". That presumption, if not rebutted, is enough: *Tanguay*, at paras. 2-5, 7.

[102] The prejudice must be assessed "in the context of the allegations made in the [plaintiff's] statement of claim": *Ticchiarelli*, at para. 33.

[103] In *Tanguay*, the court held that the presumption of prejudice strengthens with the length of delay. The court held that "given the length of the [18-year] delay…the presumption of prejudice [was] strong": *Tanguay*, at para. 2.

[104] Similarly, the court held in *Ticchiarelli* that "[t]he delay of 11 years from the initiation of proceedings until the motion to dismiss mandates a heavy onus of rebuttal": at para. 35.

[105] The court in *Tanguay* noted that plaintiffs who fail to file any materials to rebut the presumption of prejudice do so "at their peril": at pars. 3, 7.

[106] The bases for the presumption include that (i) "memories fade over time" and (ii) "justice delayed is justice denied" since "[e]xpeditious justice is the objective": *Tanguay*, at para. 2.

[107] In *Tanguay*, the court held that:

(i) On the claim for damages, the failure of a plaintiff to establish that medical records exist to address pre-existing and post-incident medical conditions resulted in a failure to rebut the presumption of prejudice: at para. 6.

(ii) The plaintiffs failed to rebut the presumption of prejudice when they provided "no information" about "recent medical records, OHIP records or income tax records": at para. 7.

[108] If discovery transcripts and/or productions can establish that witnesses' memories could be refreshed without prejudice to the defendant, the presumption of prejudice may be rebutted: *Robbs v. Lee*, 2012 ONSC 6853, at para. 49; *Air Wilga Inc. v. Orender Recip Inc. et al*, 2017 ONSC 5820, at paras. 40-41.

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[109] However, the existence of discovery transcripts does not *de facto* rebut all presumptive or actual prejudice to the defendant.

[110] In *Paliani,* Justice Verbeem dismissed an action that was over 15 years old where affidavits of documents had been exchanged and examinations for discovery had been conducted. Justice Verbeem held, at para. 65:

> The plaintiffs have attempted to rebut the presumption of prejudice, in part, by deposing to the existence of affidavits of documents and the fact that examinations for discovery were held approximately 12 years ago. Their conclusory statements in that regard do not adequately displace the operable presumption, in the context of the passage of over 20 years since the material factual events occurred. **At best, the evidence of [the Plaintiffs] in that regard demonstrates that aspects of the evidentiary record have been preserved, but their evidence on this motion fails to persuasively establish that the available evidence, including the anticipated *viva voce* evidence at trial, remains reliable despite the passage of time**. [emphasis added]

[111] Consequently, the court must consider the evidence in each case to determine whether the examination for discovery transcripts and productions rebut the presumption of prejudice.

(ii) Application of the law to the present case

[112] I first apply the relevant law to the issue of whether the plaintiff has rebutted the presumption of prejudice. I then consider the evidence as to actual prejudice arising from the loss of the IGLS Sample.

1. Rebuttal of the presumption of prejudice

[113] A “strong” and “heavy” presumption of prejudice arises on the facts of the present case. The delay is now 21 years, no reasonable explanation was provided and there were lengthy periods of time where Barbiero took no steps to advance the action.

[114] The plaintiff seeks to rebut the presumption of prejudice by relying on Dr. Pollack’s discovery evidence. The plaintiff submits that all of the relevant evidence as to Dr. Pollack’s potential liability on the common issues is already before the court, and as such, Dr. Pollack will not be prejudiced in presenting his defence.

[115] I do not agree. Dr. Pollack’s preservation of his medical records and the completion of examinations for discovery do not rebut the presumption of prejudice.

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[116] A core aspect of the common issues at trial is whether Dr. Pollack used an adulterated IGLS product or a Dow Corning product. While the plaintiff alleges that neither product would have been legal to use on Dr. Pollack's patients, the plaintiff relies on the allegations summarized at para. 17(i) above that the use of an adulterated, untested, and unknown product from a P.O. box is a basis of Dr. Pollack's liability. The plaintiff's factum on this motion is replete with references to such alleged conduct, as is the statement of claim.

[117] The Grayson affidavit relies upon the same issue. Grayson refers to Dr. Pollack's discovery evidence that the IGLS originated in Panama and was delivered in an unmarked glass jar to a post office box outside Miami, Florida with no other warning labels on it. Grayson thus questions Dr. Pollack's evidence on discovery that (as summarized by Grayson) "[Dr. Pollack] believed that the [IGLS] he had been using was a Dow Corning product with a viscosity of 350 centistokes; known at the time as Dow Corning ® 360 Medical Fluid".

[118] Dr. Pollack is entitled to defend the action on the basis that (i) he used the Dow Corning IGLS product and (ii) even if he used an adulterated version, that product was safe for his patients. The discovery evidence about how Dr. Pollack purchased the product and the nature of the labelling and packaging may well be relevant to the plaintiff in asking the court to infer that the IGLS product was not manufactured by Dow Corning or was an adulterated version. However, it is the prejudice to the defendant that must be rebutted.

[119] Dr. Pollack has denied using an adulterated version of the IGLS and submits that in any event, the IGLS product he used did not cause harm. The plaintiff has filed no evidence to establish that Dr. Pollack would not be prejudiced by the passage of time to defend his positions, a prejudice which is presumed by the court.

[120] Rather than rebutting the presumption of prejudice, the Grayson affidavit and the transcript evidence buttress the presumption that Dr. Pollack's ability to defend these claims has been prejudiced by the passage of time. This failure to rebut the presumption would, on its own, suffice to grant the present motion.

[121] However, in addition, issues of causation and damages for all class members will need to be determined on an individual basis. Those claims will require medical, employment, and tax return records and testimony from all the class members. The plaintiff led no evidence to rebut the presumption that those records (some of which go back 33 years) would not be available and that memories would fade.

[122] The plaintiff submits that any prejudice arising to individual issues should be left to the trial judge after determination of the common issues and cannot serve as a basis to dismiss a class action for delay. I do not agree.

[123] As the court held in *Tanguay*, a defendant is presumed to be prejudiced by the passage of time on a claim for damages.

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[124] A similar concern would arise on establishing causation, particularly in the present case where numerous complex injuries are alleged (as outlined at para. 17 (iv) above).

[125] The plaintiff filed no evidence that Barbiero has retained any medical, employment, or tax return records that would address such complex damages and causation issues, let alone evidence relevant to any of the other patient class members. Dr. Pollack is entitled to such records to defend against the significant claims against him for the "pain and suffering, nervous shock, loss of income, impairment of earning ability, future care costs, medical costs, loss of amenities and enjoyment of life, and out of pocket expenses" allegedly caused by his conduct.

[126] Consequently, the cases relied upon by the plaintiff do not apply on the evidence before the court. The preservation of Dr. Pollack's medical records, or his evidence from his examination for discovery may enable him to defend certain common issues related to his conduct, but are not sufficient to avoid the substantial risk that a fair trial of some common and individual issues in the litigation will not be possible because of the delay.

[127] For the above reasons, I find that the plaintiff has not rebutted the presumption of prejudice.

2. Actual prejudice

[128] The plaintiff submits that there is no evidence of actual prejudice to Dr. Pollack arising from the loss of the IGLS Sample since (i) "he has made no independent efforts to test the Health Canada sample" and (ii) "sufficient evidence [exists] in the record [for the court] to determine if the Defendant's use of the substance in question complies with the relevant standard of care".

[129] The plaintiff further submits that the loss of the IGLS Sample is irrelevant since "even if, for the sake of argument, the product was manufactured by Dow Corning, Dow Corning itself warned against its use for the purpose of tissue augmentation".

[130] Consequently, the plaintiff submits that it would be "ironic if the defendant is now allowed to benefit from that lack of testing to avoid a common issues trial in this proceeding".

[131] I do not agree.

[132] As I discuss above, the common issue remains before the court as to whether Dr. Pollack breached the standard of care by using an adulterated IGLS product which was unsafe for his patients. It is only in the alternative that the plaintiff alleges that liability exists even if the IGLS used by Dr. Pollack was a Dow Corning product.

[133] Barbiero alleges that (i) the IGLS obtained and used by Dr. Pollack (whether adulterated or a Dow Corning product) may not be medical grade; (ii) the use of either an adulterated or Dow Corning product exposed patient class members to serious, life-threatening injury; and (iii) as a result of the use of either an adulterated or Dow Corning product, the patient class members have sustained or are at risk of sustaining serious illness.

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[134] As I discuss above, the plaintiff's factum is replete with references to Dr. Pollack's discovery evidence relevant to the issue of whether the IGLS product was adulterated.

[135] Barbiero further alleges that she suffered from severe fatigue, anxiety, depression, and other mental health problems, hair loss, frequent migraine headaches, blurred vision, and uterine hemorrhaging following treatment with IGLS by Dr. Pollack.

[136] Dr. Pollack denies these allegations. He pleads that there was no legal restriction on his use of IGLS and he obtained it from a source outside of Canada. He denies that the IGLS was adulterated. He further denies that any of the illnesses the Class Members may have sustained or are allegedly at risk of sustaining were caused or related in any way to treatments of IGLS they received.

[137] Without access to the IGLS Sample, Dr. Pollack is prejudiced in his ability to prove that the IGLS was a Dow Corning product and/or a medical grade product. Without testing, Dr. Pollack cannot establish that the IGLS could not, based on its composition, have caused any of the illnesses or injuries alleged by the class.

[138] The plaintiff submits that she may still be able prove her case against Dr. Pollack without the IGLS Sample. That may be so. On the transcript evidence discussed above, the evidence of unlabelled, clear liquid which originated in Panama and was delivered in unlabelled boxes from a P.O. box in Florida might permit a court to conclude that the IGLS used by Dr. Pollack was adulterated.

[139] In written and oral argument, Class Counsel reviewed in considerable detail the merits of the plaintiffs' claim that Dr. Pollack used an adulterated form of IGLS. However, the court on a motion to dismiss for delay does not consider the merits of a claim. Instead, as the court held in *Langenecker* and in *Tanguay*, the issue is whether there is prejudice (presumed or actual) which raises a substantial risk that the defendant cannot properly defend the allegations.

[140] Barbiero submits that Dr. Pollack cannot seek a dismissal when he could have tested the IGLS Sample under the March 2005 Order. However, that order required that the IGLS Sample be released from Health Canada to Bodycote, who was then responsible for dividing the sample under laboratory-controlled conditions into three parts, one of which would be sent to Dr. Pollack's expert.

[141] Bailey's uncontested evidence is that (i) Health Canada contacted Class Counsel several times in 2005 and 2006 about when Class Counsel intended to transfer the IGLS Sample to Bodycote, and (ii) Class Counsel never arranged for the transfer and never responded to Health Canada after January 30, 2006.

[142] Barbiero also submits that Dr. Pollack should have tested the IGLS "before or during the time he was administering" it to patients. I do not agree. A defendant is not required to anticipate that a lawsuit may be commenced against them before they are served with an originating process.

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[143] While the conduct of a defendant may be relevant if the defendant resisted the plaintiff's efforts to advance the action, that is not the case here. At all times, Dr. Pollack cooperated with the orderly progress of this action. There is no evidence of any delay on the part of Dr. Pollack. To the contrary, the uncontested evidence is that counsel for Dr. Pollack wrote to Class Counsel numerous times between 2012 and 2019 to inquire about the status of the additional information.

[144] Based on the settled law discussed above, Barbiero is responsible for advancing her own lawsuit: *Ever Fresh Direct Foods Inc. v. Jamia Islamia Canada Ltd.*, 2021 ONSC 1278 at paras. 87-88, aff'd 2022 ONCA 185. She failed to do so. Dr. Pollack bears no responsibility for that lack of progress.

[145] Consequently, even if I were to accept that Barbiero rebutted the presumption of prejudice (which I do not for the reasons discussed above), Dr. Pollack has suffered actual prejudice due to the loss of the IGLS Sample. The action should be dismissed for delay.

Issue 2: Whether the court should exercise its jurisdiction to make an order dismissing the present class action for delay

[146] I first address the jurisdiction of the court to dismiss a certified class action for delay. I then consider whether I should exercise my discretion to do so.

Jurisdiction of the court to dismiss a certified class action for delay

[147] Neither party provided a precedent for the court considering a motion to dismiss a certified class action for delay. I review below the jurisdiction of the court to make an order under Rule 24.01 or under its inherent jurisdiction to dismiss an action for delay.

[148] Section 35 of the *CPA* is clear that the *Rules of Civil Procedure* apply to proceedings under the *CPA*. There is no exclusion under Rule 24.01 for class actions, regardless of whether they are certified. Consequently, Rule 24.01 applies to class actions.

[149] Further, s. 29(2) of the *CPA* contemplates that a proceeding other than one under s. 29.1 (which provides for automatic dismissal of a proposed class action if the conditions under s. 29.1 are met) may be dismissed for delay, again without distinction between proposed or certified class actions:

> In approving a discontinuance or abandonment, or in dismissing a proceeding for delay, other than under s. 29.1, the court shall consider whether notice should be given under section 19 …

[150] Prior to the enactment of the legislative amendments to the *CPA* which brought s. 29.1 into effect for the dismissal of a proposed class action for delay, the courts applied Rule 24.01 to proposed class actions and dismissed them for delay.

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[151] In *Smith v. Armstrong*, 2018 ONSC 2435, R.D. Gordon, R.S.J. noted that s. 29(4) of the *CPA* (as does the present s. 29(2)) explicitly referred to dismissal for delay as a basis for providing notice to the class members. The court applied Rule 24.01 to dismiss the proposed class proceeding: at paras. 18-20.

[152] R.D. Gordon, R.S.J. concluded that the 17-year delay between commencement of the action and the certification motion was inordinate and unexplained and resulted in "a reasonably strong presumption of prejudice": at paras. 33, 50-51. The court held: "it is reasonable to assume that there will [be] significant factual issues requiring the testimony of those involved some 25 years ago," and those witnesses may no longer be available: at para. 55.

[153] The court also can dismiss an action for delay pursuant to its inherent jurisdiction: *Wallace*, at paras. 19-22.

[154] The same principles apply to a certified class action. The plaintiff (whether as a proposed representative plaintiff or a certified representative plaintiff) may do nothing to move an action forward, resulting in an inordinate and inexcusable delay. In either case, the result of that conduct may, through a presumption of prejudice and/or evidence of actual prejudice create a substantial risk that a fair trial of the issues in the litigation will not be possible.

[155] Barbiero relies on *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2016 ONCA 24, 344 O.A.C. 222, which considered s. 27(3) of the *CPA*. Barbiero submits that *Pet Valu* stands for the proposition that the present motion cannot affect the claims of individual class members beyond Barbiero. Barbiero submits that s. 27(3) means that only a judgment on the certified common issues can impact the rights of individual class members.

[156] However, neither *Pet Valu* nor s. 27(3) prevents a certified class action from being dismissed for delay. In *Pet Valu*, the court held that a trial judge at a common issues trial cannot alter the certified common issues in a way that effectively renders judgment on an issue that was never certified: at para. 49. Such a conclusion is consistent with s. 27(3) that limits a decision on common issues to those set out in the certification order. That issue is not relevant to a dismissal for delay.

[157] It is possible that no case law exists on the present jurisdiction issue as the circumstances of an inordinate or inexcusable delay in certified class actions would be extremely rare. It is not contested, as submitted by the plaintiff, that "[c]lass proceedings are subject to a robust case management system". Any party can raise concerns about the pace at which a class action progresses, and counsel typically move a certified class action forward to a common issue trial or settlement in a reasonable time period given the complexity of many class action matters.

[158] However, if a representative plaintiff in a certified class action fails to move the action forward, resulting in a delay that meets the *Langenecker* test, then the court has jurisdiction to dismiss the certified class action for delay. While such circumstances may be extremely rare, the remedy of dismissal for delay should remain available.

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[159] It remains the plaintiff's obligation to move a class action forward. If the court finds a substantial risk that a fair trial of the issues in the litigation will not be possible because of inordinate and inexcusable delay, through a presumption of prejudice or by evidence of actual prejudice, the class action should be dismissed for delay, regardless of whether it is a proposed or certified class action.

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The practical effect of a dismissal order of a certified class action under Rule 24.01

[160] The plaintiff agreed that the court has jurisdiction to make such an order but submitted that under s. 12 of the *CPA*, the court should not exercise its discretion to do so.

[161] The plaintiff relies on Rule 48.14(1), as an example where the courts do not apply the *Rules* to dismissal for delay of a class action. Under Rule 48.14(1), actions are dismissed if not listed for trial within five years from the commencement of the action. The plaintiff submits that just as a Rule 48.14 dismissal is not available for a class action, nor should a dismissal for delay be exercised under Rule 24.01. I do not agree.

[162] To the contrary, the explicit exclusion of Rule 48.14 dismissals to class actions under Rule 48.14(1.1)(b) supports Dr. Pollack's position that a motion to dismiss for delay can be exercised.

[163] The plaintiff submits that "even if this motion is successful, only the Plaintiff's individual claim, and not this certified class action will be dismissed". The plaintiff further submits that:

> Given the stay of limitation periods provided by section 28 of the CPA it would, if the Plaintiff's claim was dismissed, be open for an alternative Class Member to step into the role of Representative Plaintiff and to continue with this proceeding. Replicating large parts of the already completed discovery process would be of no benefit to the parties to this proceeding. Conversely, setting this action down for trial will lead to an efficient, full and fair resolution of the dispute in this action.

[164] Section 28(3) of the *CPA* suspends "any limitation period applicable to a cause of action asserted in a proceeding under this Act", "in favour of a class member on the commencement of the proceeding". I adopt the analysis of R.D. Gordon, R.S.J. in *Smith*, at paras. 30-32:

> For the reasons which follow, it is my view that dismissal for delay does not preclude a subsequent class proceeding by another representative. To begin with, the Act does not create a cause of action. It creates a procedural regime by which a representative plaintiff is allowed to assert a cause of action on behalf of others with similar interests. It makes little sense to suspend the limitation period relating to the cause of action but impose a limitation period on the procedure by which that action may proceed. Second, prohibiting a subsequent class proceeding may hinder access to justice and promotion of judicial economy, two of the main public policy objectives behind the Act. Third, it would be unfair to take this potentially beneficial procedural regime from a putative class member who has

> not … previously been present before the court and has not had any ability to determine the course of the earlier litigation.
>
> I would also note that in *Naylor v. Coloplast Canada Corp*., [2018] O.J. No. 923, 2016 ONSC 1294 (S.C.J.), Perell J. contemplated that notice of discontinuance to putative class members in a class proceeding would provide them an opportunity to consider alternatives including starting a new class action.
>
> It follows, then, that dismissal of this class proceeding for delay would have substantive affect only on Mr. Smith. A caveat to this may be the impact, if any, of the ultimate limitation period of 15 years prescribed by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. Although the Ontario Court of Appeal in *Coulson v. Citigroup Global Markets Canada Inc.*, [2012] O.J. No. 717, 2012 ONCA 108 expressed its "grave doubts" that the ultimate limitation period would resume retroactive to the date of suspension of the limitation period, it left determination of that issue to a future case requiring its resolution.

[165] However, the ability of another class member to bring a new class action does not mean that a dismissal for delay has no practical effect. To the contrary, there are practical effects if a new class action is brought in the present case.

[166] First, a new proposed representative plaintiff may need to satisfy the new certification provisions under s. 5(1.1) of the *CPA*, which is a practical effect of a dismissal of the action for delay. Whether that new claim would succeed in being certified is not an issue before this court.

[167] The modified certification requirements under s. 5 (1.1) were not in effect when the present class action was certified in 2003. In particular, on a new proposed class action, the court may have to consider whether (i) the proposed class action "is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant … including … the case management of individual claims" and (ii) "the questions of fact or law common to the class members predominate over any questions affecting only individual class members".

[168] Second, Dr. Pollack submits that he could oppose certification based on the risk to his defence arising from the delay, based on the actual prejudice as a result of the loss of the IGLS Sample or the presumption of prejudice arising from memory loss of witnesses or lost records for events of 33 years ago. Dr. Pollack further submits that he would be entitled to consider the evidence relied upon by a new representative plaintiff as to matters such as memory and medical records, which Dr. Pollack may rely upon to oppose certification.

[169] The plaintiff submits that Dr. Pollack could not maintain such a position given the suspension of limitation periods under s. 28(3) of the *CPA*. Under the plaintiff's position, Dr. Pollack would face the same prejudice, as the class action would be certified despite the same passage of time and loss of the IGLS Sample.

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[170] I do not decide this issue on this motion. However, this is a potential practical effect that the court may address on a new certification motion.

[171] Third, Dr. Pollack relies on s. 15 of the *Limitations Act, 2002*, and submits that he could oppose certification of a new class action on the basis that the ultimate limitation period of 15 years has expired. The plaintiff submits that Dr. Pollack would be precluded from relying on the ultimate limitation period given the suspension of limitation periods under s. 28(3). This issue also raises a practical effect and may be considered if a new class action is brought.

[172] Consequently, in the present case, I would exercise my discretion to dismiss the class action for delay. A dismissal order is necessary to protect against the presumed and actual prejudice to Dr. Pollack arising from the evidence before the court. The practical effects (or potential legal issues arising from a new certification motion) support the exercise of my discretion to dismiss the action.

Notice under s. 19 of the CPA

[173] Given the potential significant effect on all of the class members arising from the dismissal of the present class action for delay, I order that Class Counsel provide notice to class members of the dismissal under s. 19 of the *CPA*.

[174] Counsel shall provide me with draft terms of the proposed notice within 10 days from the date of these reasons. The limitation period will remain suspended until the court signs the order dismissing the action for delay which will include the terms of notice. If necessary, I will conduct a case conference to address the proposed notice terms.

Order and costs

[175] For the above reasons, I grant the motion and dismiss the class action for delay. The dismissal will take effect upon signing of the order which will incorporate terms of notice to the class members.

[176] If the parties cannot agree as to costs, the defendant shall provide written costs submission of no more than three pages (not including a costs outline) by April 19, 2024. The plaintiff shall deliver responding written costs submissions of no more than three pages (not including a costs outline) by May 3, 2024. If necessary, the defendant may deliver reply costs submissions of no more than one page by May 10, 2024.

GLUSTEIN J.

Date: 20240314

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CITATION: Barbiero v. Pollack, 2024 ONSC 1548
COURT FILE NO.: 03-CV243858CP
DATE: 20240314

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ANNA BARBIERO

Plaintiff

AND:

DR. SHELDON VICTOR POLLACK

Defendant

REASONS FOR DECISION

Glustein J.

Released: March 14, 2024