CITATION: DeBlock v. Monsanto Canada ULC, 2023 ONSC 6954
COURT FILE NO.: 699/19CP
DATE: 20231208

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
JEFFREY DEBLOCK Plaintiff	*Jonathan Ptak, Adam Tanel, Sue Tan, Matt Baer and Chelsea Smith* for the Plaintiff
-and-	
MONSANTO CANADA ULC,[1] MONSANTO COMPANY and BAYER INC.	*William McNamara, Grant Worden, Nicole Mantini, Toschach Weyman, Alicja Puchta and Morag McGreevey*, for the Defendants
	HEARD: March 28, 29 and 30, 2023

GRACE J.

A. Introduction

[1] This action was commenced under the *Class Proceedings Act, 1992* ("*CPA*") on June 21, 2019. At its core is an allegation that the defendants have produced, marketed, distributed

[1] Now Bayer CropScience Inc.

and sold herbicide products containing a cancer-causing synthetic compound called glyphosate.

[2] Jeffrey DeBlock is named as the proposed representative plaintiff. It is alleged that in early 1995 he was diagnosed with non-Hodgkin's lymphoma. He was then seventeen years old. Although he survived, Mr. DeBlock alleges there have been long-term impacts on his physical and mental health.

[3] Mr. DeBlock attributes his diagnosis – and the health problems that have followed – to glyphosate, an active ingredient contained in some of the herbicides manufactured, marketed, distributed and sold by the defendants under the brand name Roundup.

[4] He maintains that: (i) glyphosate is carcinogenic; and (ii) causes cancer, specifically non-Hodgkin's Lymphoma" or "NHL" in humans who have had significant exposure to it.

[5] In part, Mr. DeBlock relies on Monograph 112 published by the World Health Organization's, International Agency for Research on Cancer ("IARC")[2] in June 2015. A Working Group comprised of seventeen scientists had concluded that glyphosate was "probably carcinogenic to humans".

[6] The plaintiff also points to evidence provided by biostatistician Dr. Christopher Portier and hematopathologist, Dr. Dennis Weisenburger.

[7] Corporate intrigue is part of the plaintiff's case too.

[8] Mr. DeBlock also relies on others who have come forward and attribute their NHL diagnosis to Roundup products containing glyphosate.[3]

[9] The defendants maintain the premise for this action is flawed. They note that the sale of glyphosate in Canada was authorized by the federal regulator in 1976. Health Canada's

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[2] IARC Working Group, *Some Organophosphate Insecticides and Herbicides: Diazinon, Glyphosate, Malathion, Parathion and Tetrachlorvinphos*, 2015, IARC Monograms Program, Lyon, France, Volume 112.
[3] They are Vince Froehler, Joanna Quail, Ernest Darocy and Gayle Veno.

Pest Management Regulatory Agency (the "PMRA") commenced a multi-year re-evaluation of glyphosate in 2009.

[10] In 2017, the PMRA concluded "that glyphosate is unlikely to pose a human cancer risk". In a statement issued on January 11, 2019, Health Canada confirmed its finding notwithstanding receipt of eight notices of objection.

[11] Litigation of this kind is not confined to Canada. A number of lawsuits have been commenced in the United States. Several individual actions have gone to trial. Results there have been mixed but throughout, the defendants have maintained the same position they have adopted in Canada.

[12] Subject to court approval, a settlement of a multi-district action commenced in California was negotiated in 2020. Although liability was not admitted, the proposed settlement contemplated a payment in the billions of dollars.[4] The required authorization was not obtained.[5]

[13] In addition to challenging the plaintiff's evidence, the defendants rely on supportive evidence from experts they have retained: hematologist/oncologist Dr. Christopher Hillis, toxicologist Dr. Leonard Ritter and occupational hygienist/epidemiologist Dr. John Murphy.

[14] On this motion, the court is not being asked to make dispositive findings. Instead, as required by the *CPA*, Mr. DeBlock seeks: (i) an order certifying this action as a class proceeding; and (ii) appointing him as representative plaintiff.[6]

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[4] A News Release was issued by Bayer AG on June 24, 2020.
[5] Pretrial Order No. 235: Denying the Motion for Preliminary Approval of United States District Judge, Vince Chhabria dated May 26, 2021, *In Re: Roundup Products Liability Litigation.* United States District Court, Northern District of California.
[6] *Class Proceedings Act, 1992*, S.O. 1992, C.6, s. 2(2).

B. The Requirements for Certification

i. The applicable test

[15] In order to certify a class proceeding, five statutory preconditions must be met.[7] They are:

a. The pleadings disclose a cause of action;

b. There is an identifiable class of at least two persons that would be represented by the named plaintiff;

c. The claims of the class members raise common issues;

d. A class proceeding would be the preferable procedure for the resolution of the common issues; and

e. There is a representative plaintiff who: (i) would fairly and adequately represent the interests of the class; (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.[8]

[16] The parties agree that if all five criteria are satisfied, certification must follow.[9]

[17] I cannot improve on the defendants' explanation of the interrelationship between those elements. At para. 61 of their factum, they said:

> The requirements for certification are linked: the disclosed cause(s) of action must be shared by an identifiable class and must yield common issues that can be resolved in a fair, efficient, and manageable way, that will materially advance the claims of all class members in a manner that represents a preferable use of scarce judicial resources and serves the goals of class actions: access to justice, judicial economy, and behaviour modification.[10] The core of a class proceeding is the "element of commonality". Although it need not predominate over individual issues, there must be some degree of commonality in the wrong alleged to have

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[7] Those are set forth in s. 5(1) of the *CPA*.
[8] Ss. 5(1)(a) through (e).
[9] They agreed that the exceptions set forth in ss. 5(6) and 5.1 of the *CPA* are of no application.
[10] They cited *Martin v. AstraZeneca Pharmaceuticals PLC*, 2012 ONSC 2744, at para. 94, aff'd 2013 ONSC 1169 (Div. Ct.)

> been committed by the defendant and some basis in fact to support that commonality.[11]

[18] Mr. DeBlock submits that each precondition is met in this case. The defendants say he has not fulfilled any of them.

[19] A motion of this kind is not a surrogate trial. Nonetheless, the court plays an important gatekeeping role. As Rothstein J. wrote in *Pro-Sys Consultants Ltd. v. Microsoft*, 2013 SCC 57, at para. 103:

> ... it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" ... [N]or does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny. [Citation omitted]

[20] Nonetheless, a certification motion is not intended to be a pronouncement on the viability or strength of the action": *Pro-Sys Consultants Ltd. v. Microsoft*, *supra*, at para. 102.

[21] Mr. DeBlock bears the onus of proof. He must establish that the pleadings disclose a cause of action and that there is some basis in fact for each of the other certification requirements: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, at para. 25.

ii. Do the pleadings disclose a cause of action? (*CPA*, s. 5(1)(a))

[22] When determining whether the plaintiff's pleading discloses a cause of action, the court asks whether it is plain and obvious that the claim under consideration cannot succeed: *Pro-Sys Consultants Ltd. v. Microsoft*, *supra*, at para. 63. The inquiry:

> ... proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven ... No evidence is admissible ... It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim ... The claimant may not be in a position to prove the facts pleaded at the time ... It may only hope to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of

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[11] They cited *Frohlinger v. Nortel Networks Corporation*, [2007] O.J. No. 148 (S.C.J.), at paras. 24 – 25.

> success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.[12]

[23] The plaintiff's current pleading is an Amended Fresh as Amended Statement of Claim (the "Claim"). Battery, negligence (negligent design and failure to warn), unjust enrichment and constructive trust are the subheadings that appear in the portion of the Claim devoted to "Causes of Action".

[24] The defendants acknowledge that the pleading discloses a cause of action in negligence. At issue is the adequacy of the allegations based on battery, unjust enrichment and constructive trust. I will deal with each of them in turn.

Battery

[25] In this proceeding, the plaintiff seeks a declaration that the defendants committed battery against the proposed class members.[13]

[26] Writing for the majority in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at para. 26, La Forest J. said that a "battery is the intentional infliction of unlawful force on another person."

[27] The inviolability of a person's body and physical integrity is the foundation for an action for trespass to the person. That tort includes battery and requires direct interference with the individual: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 ("*Scalera*"), at paras. 8 and 11.

[28] Directness is "an essential requirement for liability": Philip H. Osborne, *The Law of Torts*, 6th ed. (Toronto: Irwin Law, 2020), at 269; *Scalera*, *supra*, at para. 11.

[29] Interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant. The burden is then on the defendant to establish a defence, such as consent: *Scalera*, *supra*, at para. 8.

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[12] *R. v. Imperial Tobacco*, 2011 SCC 42, at para. 22.
[13] In para. 2(b) of the Claim. Allegations specific to Battery are set forth in paras. 63 – 68 of that document.

[30] While battery involves "direct interference" with the person, not every physical touching will constitute battery. The interference must comprise "non-trivial" contact that is "harmful or offensive": *Scalera*, *supra*, at paras. 16 - 17.

[31] However, actual physical or psychological injury is not required: *Scalera*, *supra*, at paras. 16 and 22. Further, the "defendant need not have intended to harm or injure the plaintiff": *Scalera*, *supra*, at para. 96.

[32] In this case, the plaintiff alleges that the defendants have manufactured, distributed and sold Roundup across Canada knowing, despite publicly denying, that (i) glyphosate is carcinogenic; (ii) persons applying products containing that ingredient would absorb glyphosate into their bodies through direct contact and inhalation; (iii) significant exposure to glyphosate causes NHL; (iv) purchasers were never warned of the risks and therefore, did not consent to them; and (v) purchasers would not have consented to the risks had they been informed of them. The plaintiff says, "the [d]efendants placed Roundup into the stream of commerce … intending for it to be used as widely as possible."[14]

[33] The Claim includes other paragraphs that are relevant to this proposed cause of action. At paras. 67 and 68, the plaintiff alleges that:

> As a direct result of the Defendants' wrongful acts, the Plaintiff and Class Members experienced Significant Exposures to cancer-causing Roundup. The Defendants caused a harmful substance to contaminate the Plaintiff's and Class Members' bodies without consent as to the cancer risks. Consequently, the Defendants have committed a battery against all Class Members.
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> The Plaintiff and all Class Members have been subjected to increased risk of cancer and of changes to their bodies at the cellular and molecular level. The Plaintiff and the other non-Hodgkin's lymphoma Class Members have developed cancer caused by their Significant Exposure to Roundup…

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[14] Taken from para. 63 of the Claim.

[34] The defendants submit that the Claim is deficient because the allegations do not satisfy the "directness" requirement for battery.[15] They rely on *Albanese v. Franklin et al.*, 2016 ONSC 6479 (S.C.J.). At para. 121, Whitten J. wrote:

> Professor Lewis Klar in his text *Tort Law*, 3rd ed. (Toronto: Carswell, 2003), at p. 27, proposes the following as a workable test for directness:
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> > An inquiry [*sic*] can be described as being directly produced by a defendant's act when it flows naturally from it, without the necessity of an intervention by another independent factor. Where, however, the defendant's act merely creates the situation of danger and requires an additional act to produce the ultimate injury, the injury can be described as only flowing indirectly from the initial act.

[35] At para. 68 of their factum, the defendants say:

> ... Roundup products must be purchased and used – at a level sufficient to satisfy the Plaintiff's "Significant Exposure" threshold – in order to create the alleged contact and harm. Both purchase and use are intervening acts not committed or controlled by the Defendants.[16]

[36] The plaintiff relies on *Wuttunee v. Merck Frosst Canada Ltd.*, 2007 SKQB 29. In that case, it was alleged that the pharmaceutical company had designed, manufactured and marketed "a defective and dangerous" anti-inflammatory drug known as Vioxx. The originating pleading alleged that the product entered the bodies of the claimants as Merck had intended and that their "bodily interests ... were invaded by the direct or sufficiently proximate indirect acts of Merck".[17]

[37] At para. 54, Klebuc J.C.S. (as he then was) said in part:

> Although some questions remain as to whether, on the merits, the actions of Merck were sufficiently direct to constitute a battery, I am satisfied, in light of Linden's [*Canadian Tort Law*, 7th ed. (Markham: Butterworths, 2001)] pronouncement that certain indirect intrusions give rise to findings of battery, that the plaintiffs have pled sufficient facts to warrant further

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[15] At para. 70 of their factum, the defendants also maintained that the plaintiff failed to allege they intended that the product and human bodies come into contact or that any harm would come from the use of their products.
[16] In that paragraph, the defendants rely upon *Kelleher v. Langille-Westhaver*, 2016 NSSC 200, at paras. 19 – 20 and *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143, at paras. 94-100.
[17] Taken from para. 49 of the decision.

> consideration of their claim as a novel or timely expansion of the tort of battery.[18]

[38] The certification decision in *Wuttunee v. Merck Frosst Canada Ltd.* was the subject of a successful appeal, although the cause of action analysis was not raised or argued at the appellate level.[19] Interestingly, battery was not one of the causes of action plead in a parallel class proceeding in Ontario involving Vioxx.[20]

[39] Battery was one of the causes of action raised in *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143. In that case, it was alleged that the operators of steel works had continued to produce harmful emissions "with full knowledge and intention that the [claimants] would be exposed to them."[21]

[40] The certification judge found that battery was one of several arguable claims. The Nova Scotia Court of Appeal disagreed. Directness had not been pleaded. At para. 100, the court added:

> Nor do the supporting facts on which [the plaintiffs] rely sustain such a plea.

[41] In my view, the defendants' argument concerning directness carries the day. This court is bound by the majority decision in *Scalera*. In that case, the Supreme Court of Canada was asked to revisit the "traditional rule … that the plaintiff in an action for trespass to the person (which includes battery) succeeds if she can prove direct interference with her person."[22] The court concluded that approach remained appropriate.[23] Importantly, *Scalera* was not cited, let alone analyzed, by the motions judge in *Wuttunee v. Merck Frosst Canada Ltd.*

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[18] Other examples provided to the court included *Scott v. Shepherd* (1773), 96 E.R. 525 (K.B.) and *McDonald et al. v. Sebastian* (1987), 81 N.S.R. (2d) 189 (N.S.S.C.). The plaintiff also referred to *Jackel v. Grieve*, 1996 CanLII 8418 (B.C.S.C.), at para. 45. In that case the damage award compensated "the plaintiff for the assault of removing her pants, and for administering drugs without her knowledge and consent, which is battery." With respect, that fact situation is not analogous.

[19] *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43.

[20] *Tiboni v. Merck Frosst Canada Ltd.*, 2008 CanLII 37911 (Ont. S.C.J.), at para. 44.

[21] From para. 96 of the decision.

[22] From para. 8.

[23] At para. 11.

[42] I recognize that the Claim alleges that significant exposure to an herbicide containing glyphosate was a "direct result" of the actions of the defendants. However, form does not prevail over substance. In *Scalera, supra* separate reasons were given by Iacobucci J. At para. 50, he addressed this point by saying:

> A plaintiff cannot change an intentional tort into a negligent one simply by choice of words, or vice versa ... [A] court must look beyond the choice of labels and examine the substance of the allegations contained in the pleadings. This does not involve deciding whether the claims have any merit; all a court must do is decide, based on the pleadings, the true nature of the claim.[24]

[43] In this case, it is alleged that herbicide containing glyphosate was manufactured, packaged, distributed, sold and then, at some point and in some way, used. The plaintiff's proposed definition of "Class" and "Class Member" requires something more than use of Roundup. It requires "Significant Exposure".[25]

[44] In *Scalera, supra*, the Supreme Court of Canada said that interference is direct "if it is the immediate consequence of a force set in motion by an act of the defendant".[26] Battery was said to be "unlike negligence, where the requirement of fault can be justified because the tortious sequence may be complicated".[27] The allegations in this case lack the required factual simplicity.[28]

[45] In my view, the plaintiff does not have a cause of action in battery.

[46] Anticipating the possibility of that conclusion, the plaintiff asked that the court apply the principles expressed by Perell J. in *Price et al. v. Smith & Wesson Corp.*, 2021 ONSC 1114 (S.C.J.). At para. 54, my colleague said:

> Matters of law that are not fully settled should not be disposed of on a motion to strike an action for not disclosing a reasonable cause of action,

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[24] See, too, *Palmer v. Teva Canada Ltd.*, 2022 ONSC 4690 (S.C.J.), at para. 220.
[25] Paragraph 1(i) of the Claim defines "Significant Exposure" as the application of Roundup on more than two occasions in a 12-month period and more than 10 occasions in a lifetime.
[26] At para. 8.
[27] At para. 11.
[28] *Sydney Steel Corporation v. MacQueen*, 2013 NSCA 143, at paras. 94 – 100.

> and the court's power to strike a claim is exercised only in the clearest of cases. The law must be allowed to evolve, and the novelty of a claim will not militate against a plaintiff. However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law. [Citations omitted]

[47] The insurmountable difficulty facing the plaintiff here is that the constituent elements of a claim based on battery are fully settled. As noted, this country's highest court declined the invitation to vary the historical treatment of that intentional tort.[29]

Unjust enrichment

[48] The plaintiff also seeks a declaration that the defendants have been unjustly enriched[30] and "an accounting for and disgorgement of profits or revenues, or a constructive trust over same".[31]

[49] Broadly speaking, the doctrine of unjust enrichment applies when one person receives a benefit from another in circumstances where it would be "against all conscience" for it to be retained. In that event, the recipient will be required to restore the benefit to the claimant: *Moore v. Sweet,* 2018 SCC 52, at para. 35. As McLachlin J. (as she then was) explained in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at 788:

> At the heart of the doctrine of unjust enrichment . . . lies the notion of restoration of a benefit which justice does not permit one to retain."

[50] For a claim of unjust enrichment to succeed, the claimant must establish three elements: (i) an enrichment of or benefit to the recipient, (2) a corresponding deprivation of the claimant, and (3) the absence of a juristic reason for the enrichment: *Peel (Regional Municipality) v. Canada*, *supra*, at 784.

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[29] This situation is not analogous to the one discussed in *Carey v. Hunt*, [1990] 2 S.C.R. 959, at pp. 989 – 990. Given that conclusion, I have not addressed the issue of intention as discussed in various authorities including *R.D.F. (Litigation Guardian) v. Co-operators General Insurance*, 2004 MBCA 156, at para. 31.

[30] Sought in para. 2(g) of the Claim. Allegations under the heading "Unjust Enrichment" are at paras. 81 – 83 of the Claim.

[31] Sought in para. 2(m) of the Claim. Allegations under the heading "Constructive Trust" are at paras. 84 – 87 of the Claim.

[51] In order to prove the recipient was enriched, the claimant must show that they gave something to the other party which was received and at least temporarily, retained. A payment of money is the most obvious example. However, something negative, such as a benefit that relieves the defendant of a liability, is possible too: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, at paras. 31 and 37.

[52] The second requirement obliges the claimant to establish that the enrichment provided to and retained by the recipient corresponds to a deprivation which the claimant has suffered: *Pettkus v. Becker,* [1980] 2 S.C.R. 834, at 852; *Rathwell v. Rathwell,* [1978] 2 S.C.R. 436, at 455.

[53] In paragraph 81 of the Claim, Mr. DeBlock alleges that:

> ... there has been a deprivation of the Plaintiff and the Class and a corresponding enrichment of the Defendants, by reason of the breaches of the [*Pest Control Products Act*] and tortious misconduct – negligence and battery – described herein. The Plaintiff and Class have suffered harm as a result of Significant Exposure to Roundup. The Defendants have enriched themselves by subjecting the Plaintiff and Class to Significant Exposure to Roundup. This deprivation and corresponding enrichment is without juridical reason.

[54] It follows, Mr. DeBlock says, that the defendants should be required to "disgorge their unjustly acquired profits and other monetary benefits resulting from their unlawful conduct".[32]

[55] In addition, the plaintiff pleads that the defendants owed and breached an equitable obligation "to ensure the safety of their products" and seeks to impress a constructive trust on "[a]ll proceeds in the hands of the Defendants from the sale of Roundup".[33]

[56] Based on my review of the authorities, this aspect of the Claim is not a viable one. Bluntly, the description of "enrichment" and "deprivation" contained in the quoted portion of the Claim is entirely unclear. In substance, the plaintiff's allegation is that the defendants'

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[32] From para. 83 of the Claim. This remedy is also sought by the plaintiff in para. 1(m) of the Claim.
[33] From para. 85 of the Claim. This remedy is also sought by the plaintiff in para. 1(m) of the Claim.

product was unsafe because it contained glyphosate. In *Palmer v. Teva Canada Ltd.*, 2022 ONSC 4690 (S.C.J.), at para. 269, Perell J. explained that:

> Courts in recent decisions in proposed products liability cases, which I would adopt … have recognized that the loss from a shoddy good is not the type of deprivation or transfer of wealth that is amenable to an unjust enrichment claim.[34]

[57] I agree. Further, whether written or oral, the contracts of sale underlying the purchases of Roundup provided a juristic reason for the benefit the defendants actually received, the purchase price.

[58] Those conclusions deal a fatal blow to the corresponding remedies Mr. DeBlock seeks. As Morgan J. noted in *David v. Loblaw*, 2021 ONSC 7331 (S.C.J.), at para. 44:

> … constructive trust is a remedy, not a stand-alone cause of action … In the absence of a valid claim for unjust enrichment … the pleading of constructive trust cannot stand. [Citation omitted][35]

Negligence

[59] The plaintiff seeks a declaration that the defendants: (i) breached their duty of care to the Class Members; (ii) were negligent in the research, development, design, manufacture, testing, distribution, sale and marketing of Roundup products; and (iii) were negligent in their failure to warn Roundup users and the public of the health risks associated with Significant Exposure to Roundup.[36] As noted, the defendants acknowledge that the Claim discloses a cause of action insofar as the allegations of negligence are concerned.[37]

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[34] Perell J. cited *Kane v. FCA US LLC*, 2022 SKQB 69, at para. 143 and *Spring v. Goodyear Canada Inc.*, 2021 ABCA 18.

[35] The same principle applies to the request for disgorgement: *Carter v. Ford Motor Company of Canada*, 2021 ONSC 4138, (S.C.J.) at paras. 165 – 166.

[36] As set forth in paras. 2(c), (d) and (e), respectively of the Claim. "Significant Exposure" and "Roundup" are defined in paras. 1(i) and (h), respectively of the Claim.

[37] They appear at paras. 69 - 72 (negligent design) and paras. 73 – 80 (failure to warn).

iii. Is there an identifiable class? (*CPA*, s. 5(1)(b))

[60] Section 5(1)(b) of the *CPA* requires that there be an identifiable class of two or more persons that would be represented by Mr. DeBlock. I begin with Perell J.'s summary of the applicable principles in *Palmer v. Teva Canada Ltd.*, *supra*. At paras. 274 – 276, my colleague wrote:

> ... The definition of an identifiable class serves three purposes: (1) it identifies the person who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice.
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> In defining the persons who have a potential claim against the defendant, there must be a rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive. An over-inclusive class definition binds persons who ought not to be bound by the judgment or by settlement, be that judgment or settlement favourable or unfavourable. The rationale for avoiding over-inclusiveness is to ensure that litigation is confined to the parties joined by the claims and the common issues that arise. A proposed class definition, however, is not overbroad because it may include persons who ultimately will not have a successful claim against the defendants.
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> The class must also not be unnecessarily narrow or under-inclusive. A class should not be defined wider than necessary, and where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended. [Citations omitted]

[61] Language initially advanced by the plaintiff was revised after the certification motion was filed. He now proposes that "Class" and "Class Members" be defined as:

> a) All individuals in Canada who have had Significant Exposure to Roundup; and
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> b) All individuals in Canada who are the living spouse, child, grandchild, parent, grandparent, or sibling of a Non-Hodgkin's Lymphoma Class Member.[38]

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[38] See para. 1(a) of the Claim.

[62] "Roundup" is defined to mean:

> ... any glyphosate-based herbicide product manufactured, marketed, distributed and/or sold by any one of the Defendants, regardless of whether it was marketed with the "Roundup" branding.[39]

[63] "Significant Exposure" is described as:

> ... application of Roundup on more than two occasions in a 12-month period and more than 10 occasions in a lifetime.[40]

[64] A "Non-Hodgkin's Lymphoma Class Member" is:

> ... any Class Member who has been diagnosed with non-Hodgkin's lymphoma.[41]

[65] The revisions were undertaken in light of the evidence of hematopathologist, Dr. Dennis Weisenburger.[42]

[66] The defendants submit that the proposed definitions were and still are confusing and ambiguous.[43] They say questions abound. Fore example, within the definition of the phrase "Significant Exposure" what, they ask, constitutes an "application" or an "occasion"?

[67] The defendants' objection does not arise solely from the language chosen by the plaintiff. If so, it could be swatted away. The jurisprudence makes it abundantly clear that the meaning of almost every word in the English language is capable of debate, whether appearing in isolation or in conjunction with others.

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[39] See para. 1(h) of the Claim.
[40] See para. 1(i) of the Claim.
[41] See para. 1(b) of the Claim.
[42] In his supplementary report, Dr. Weisenburger referred to a study that found the risk of non-Hodgkin's lymphoma increased significantly "for those handling glyphosate greater than 2 days/year".
[43] I note that one of the experts the defendants retained, Dr. John Murphy, provided extensive scientific commentary on the definition the plaintiff initially proposed and now proposes for the phrase "Significant Exposure": see, pp. 4 – 6; 25 – 34 of his first and pp. 3 – 11 of his second report. Among other things, Dr. Murphy distinguished between "exposure" ("the amount of chemical present in the external environment that comes into contact with the unprotected exterior of a person's body") and "dose" ("the amount of a chemical that enters into part of ... or the entire body, from the external environment via a 'route of exposure'"): see pp. 11 – 12.

[68] However, the defendants' position is based on two reports authored by occupational hygienist/epidemiologist Dr. John Murphy.[44] He explained, at length, why, in his view, the original and current definitions of "Class" and "Class Members" proposed by the plaintiff are not only unworkable but "scientifically untenable."[45] Further, Dr. Murphy suggests the plaintiff's expert has misinterpreted the evidence used when crafting revised definitions.[46]

[69] Dr. Murphy's commentary contributed to the plaintiff's decision to serve second and third reports from Drs. Portier and Weisenburger. Many aspects of the scientific debate continue.

[70] Caution must be exercised when dealing with expert evidence on a motion of this kind. As the Supreme Court of Canada said in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, *supra*, at para. 126:

> … resolving conflicts between the experts is an issue for the trial judge and not one that should be engaged in at certification …[47]

[71] In my view, the defendants invite the court to conduct a deep dive into the scientific debate the law does not permit. Although the plaintiff faces many obstacles, a genuine controversy exists. The technical evidence introduced by the plaintiff provides a basis in fact for the theory advanced. This is *not* the case Perell J. had before him in *Palmer v. Teva Canada Ltd.*, *supra*, where my colleague wrote, at para. 289:

> In fashioning common issues by asserting that there is some basis in fact for an increased risk of cancer while conceding it is premature to conclude that valsartan causes cancer is confounding, confusing, and baffling and makes the general causation question issue uncertifiable.

[72] The plaintiff relies on non-scientific evidence too. In his affidavit, Mr. DeBlock deposed that he "spent a total of between 30- and 40-days spraying Roundup during … five

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[44] They were dated December 9, 2020 and June 14, 2021.
[45] See, p. 6 of his supplementary report.
[46] See, pp. 10 – 11 of his supplementary report.
[47] See, too, *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69, at paras. 40 – 42.

summers." Affidavits of Kyle Froehler, Joanna Quail, Ernest Darocy and Gayle Veno were filed too.[48]

[73] Mr. Froehler reported using Roundup "regularly" around his property for more than 30 years and at the rate of more than 20 times a season. Ms. Quail said she applied Roundup about 4-6 times annually from 2003 to 2008. Mr. Darocy said he sprayed the herbicide a minimum of 272 to 340 times over a period of 34 years. Mr. Veno's estimate was more than 600 occasions over three decades.

[74] At some point, each one of them had been diagnosed with non-Hodgkin's lymphoma.

[75] Dr. Murphy questioned that evidence too. Some of the accounts were, in his view, vague. None suggested doses higher than human daily dose limits that are currently recommended.[49] Drs. Portier and Weisenburger did not address those aspects of Dr. Murphy's reports. I am not troubled by that fact because I am not at all confident that it was for Dr. Murphy to interpret, assess and draw conclusions from the affidavits provided by potential class members.

[76] If a person was a user of a glyphosate-based herbicide product connected to the defendants, the definitions require minimum levels of experience are required as a precondition to membership in the proposed class. Whether those criteria are scientifically correct or not cannot possibly be determined as part of this process because it would involve a level of examination that is impermissibly intense.

[77] In *Cloud v. Canada (Attorney General)*, (2004), 73 O.R. (3d) 401 (C.A.), the court was asked to certify an action on behalf of former students at a residential school and their families. At para. 47, Goudge J.A. addressed the identifiable class requirement as follows:

> ... Membership in the student class is defined by the objective requirement that a member have attended the school between 1922 and 1969. Membership in the

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[48] Some evidence those individuals provided was helpfully summarized in Appendix "1" to the defendants' factum.
[49] See pp. 39 – 40 of his initial and pp. 11 – 12 of Dr. Murphy's supplementary report. As Dr. Murphy explained, at p. 4 *et seq.* of his December 9, 2020 report, "exposure" and "dose" are not synonymous. See, too, p. 5 *et seq.* of his supplementary report dated June 14, 2021.

> families class requires that a person meet the objective criterion of being a spouse, common-law spouse or child of someone who was a student. Likewise, the siblings class is defined as the parents and siblings of those students. None of the three proposed classes is open-ended. Rather all are circumscribed by their defining criteria. All three classes are rationally linked to the common issues … in that it is the class members to whom the duties of reasonable care … are said to be owed and they are the ones who are said to have experienced the breach of those duties. Finally, because all class members claim breach … and that they all suffered some harm as a result, these classes are not unnecessarily broad. All class members share the same interest in the resolution of whether they were owed duties and whether these duties were breached.

[78] In this case, too, the proposed definition is not open-ended. It is rationally connected to the proposed common issues because all of the contemplated members share an interest in the determination of whether glyphosate is or is not a cancer risk to humans.

[79] The defendants also argued that the class definition "presumes records". It does not. Nor does there need to be any such requirement.[50] All of the affidavits to which I have referred contain biographical information that describes, in detail, the circumstances in which Roundup was applied.

[80] With respect, the defendants attempt to hold the plaintiff to a standard the law does not require. As Lax J. said in *Sauer v. Canada (Attorney General)*, 2008 CanLII 43774 (S.C.J.), at para. 28:

> At the margins, there may be some questions about class membership, but the *CPA* permits the Court to enter upon a "relatively elaborate factual investigation in order to determine class membership" … As Cullity J. said, "The fact that particular persons may have difficulty in proving that they satisfy the conditions for membership is often the case in class proceedings and is not, by itself, a reason for finding that the class is not identifiable" … [Citations omitted]

[81] And at para. 31 of that decision, Lax J. noted:

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[50] See, for example, *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.). In fact, in that case, the precise number of passengers affected was unknown. See, too, *Drynan v. Bausch Health Companies Inc.*, 2021 ONSC 7423 (S.C.J.).

> ... In *Hollick*, the court accepted a class definition of 'persons who owned or occupied property,' although occupation can be a difficult concept legally and factually. In *Bywater*, the court accepted a class definition of 'persons exposed to smoke,' The proposed class definition here is at least as objective, and arguably more so, than in those cases.[51]

[82] Those same observations apply here.

[83] Furthermore, the court shall not refuse to certify a proceeding solely because the number or identity of class members is not known: *CPA*, s. 6, item 4.

[84] As noted, the proposed class definition also includes family members of a non-Hodgkin's Lymphoma Class Member. Their claim is dependent on that person's success. In those circumstances, I do not agree with the defendants' suggestion that membership could occur even if the relative's non-Hodgkin's lymphoma diagnosis occurred before the Significant Exposure criteria were met.

[85] Nor am I troubled by the fact that there is no representative plaintiff drawn from the family member category. The claims of those persons are derivative in nature. Their existence and the potential for significant numbers of them, is apparent from the principal claim that is being advanced. At this stage, nothing more is required: *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248, at paras. 69 – 71.

[86] In the circumstances, I have concluded the identifiable class requirement has also been satisfied.

iv. Do the claims raise common issues of fact and law? (*CPA*, s. 5(1)(c)

[87] The plaintiff seeks permission to pursue a long list of questions which he characterizes as "common issues". Some appear under the heading "Factual". Others relate to the causes of action the plaintiff wishes to pursue and the balance to the remedies that are sought.

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[51] Those references were to *Hollick v. Toronto (City)*, 2001 SCC 68 and to *Bywater v. Toronto Transit Commission, supra.* For helpful discussions, see, too, *Tiboni v. Merck Frosst Canada Ltd., supra*, at paras. 64 – 82 and *Dow Chemical Company v. Ring*, 2010 NLCA 20, at paras. 60 - 77.

[88] The phrase "common issues" is defined in the *CPA* to mean:

> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.[52]

[89] A proposed class proceeding will not be certified unless it involves issues of fact or law common to all class members. McLachlin C.J. elaborated in *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534 at para. 39:

> ... Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus, an issue will be "common" only where its resolution is necessary to the resolution of each member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues ...
>
> ... All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.[53]

[90] The evidentiary bar is a low one: *Cloud v. Canada (Attorney General)*, *supra*, at paras. 51 – 53.

a. General causation

[91] The list of common issues the plaintiff seeks permission to advance includes three that are described as "general causation" questions. In *Wise v. Abbott Laboratories Limited*, 2016

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[52] See, s. 1(1).
[53] More recently, see *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, at para. 108.

ONSC 7275, at para. 342, Perell J. explained the difference between general and specific causation in these terms:

> ... "general causation" ... concerns the aspect of whether the defendant's misconduct has the capacity to cause the alleged damage and ... "specific causation" ... concerns the aspect of whether the capacity to harm was actualized in the particular case.

[92] The plaintiff's proposed general causation questions are:

(i) Can glyphosate be genotoxic in humans?[54]

(ii) Is glyphosate associated with non-Hodgkin's lymphoma? If yes, what are the risk ratios for non-Hodgkin's lymphoma generally, and for subtypes of non-Hodgkin's lymphoma?

(iii) Can Significant Exposure to Roundup cause non-Hodgkin's lymphoma? If not, at what level of exposure can Roundup cause non-Hodgkin's lymphoma.

[93] The plaintiff submits these questions are the "lynchpin for the entire exercise"[55] and that there is a basis in fact for the proposition glyphosate is a carcinogen for humans.

[94] The defendants, on the other hand, submit there is no factual support for any of the proposed common issues, including those relating to general causation. This, they maintain, is the standard the moving party must meet.[56] The deficiencies they claim to have identified relate to the ingredient glyphosate and to the disease non-Hodgkin's lymphoma.

[95] In an effort to provide context for the debate, I return to the evidentiary record the parties compiled. It is mammoth. Perhaps that is inevitable in cases of this kind. Given that this

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[54] At p. 21 of his first report, Dr. Portier said genotoxicity "refers to the ability of an agent (chemical or otherwise) to damage the genetic material with a cell, thus increasing the risks for a mutation. Genotoxic substances interact with the genetic material ... to damage cells." At p. 12 of his initial report, Dr. Hillis said that genotoxicity "refers to a chemical's ability to damage DNA" and that such damage "may result in a mutation".

[55] This quote appears in para. 62 of the plaintiff's factum and is drawn from *Kirsh v. Bristol-Myers Squibb*, 2020 ONSC 1499 (S.C.J.), at para. 43.

[56] *Kuiper v. Cook (Canada) Inc.*, 2020 ONSC 128 (Div. Ct.), at paras. 26 – 36.

is a certification motion and some of the legal principles I will come to, an abridged summary should suffice. I start with the third-party studies on which the parties rely.

[96] I have already mentioned the plaintiff's reliance on an IARC[57] publication.[58] The plaintiff's factum contains the following helpful summary:

> The classification of glyphosate as a probable carcinogen was done by an interdisciplinary IARC Working Group of seventeen scientists. IARC Working Groups are made up of experts, selected on the basis of their specific expertise in the fields of exposure characterization, cancer in humans, cancer in experimental animals, and mechanistic evidence. They provide an interdisciplinary approach with a wide array of scientific approaches and divergent viewpoints. The conclusions presented in IARC Monographs are reached on a consensus basis.
>
> IARC concluded that glyphosate is probably "carcinogenic to humans." This conclusion was based on epidemiological data, animal studies and mechanistic studies … [Footnotes omitted][59]

[97] The defendants were not swayed. They say glyphosate is not a cancer risk. Their response[60] includes the following:

> Regulatory authorities around the world, including the PMRA[61], the [Environmental Protection Agency], the European Chemical Agency … and the European Food and Safety Authority … have evaluated and re-evaluated glyphosate since its initial approval in the 1970s, and have repeatedly concluded that it does not pose a human health risk when [glyphosate-based herbicides] are used in accordance with their approved labels. [Footnote omitted]

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[57] As noted earlier, IARC is an acronym for the International Agency for Research on Cancer.
[58] As noted earlier, it was described as IARC Working Group, *Some Organophosphate Insecticides and Herbicides: Diazinon, Glyphosate, Malathion, Parathion and Tetrachlorvinphos*, 2015, IARC Monograms Program, Lyon, France, Volume 112.
[59] From paras. 13 and 14 of the plaintiff's factum.
[60] At para. 28 of their factum.
[61] The PMRA is Health Canada's Pest Management Regulatory Agency.

[98] They noted that the monograph on which the plaintiff relies specifically acknowledged that its "evaluations represent only one part of the body of information on which public health decisions may be based."[62]

[99] In 2015,[63] 2017[64] and 2019,[65] the PMRA concluded that "glyphosate continues to meet current standards and does not pose an unacceptable risk of harm to human health when used in accordance with the approved label directions."[66]

[100] As briefly mentioned earlier, Health Canada issued a statement on January 11, 2019. It referred to a "thorough scientific review" in which its "scientists left no stone unturned" and added:

> No pesticide regulatory authority in the world currently considers glyphosate to be a cancer risk to humans at the levels at which humans are currently exposed.

[101] Earlier, I mentioned corporate intrigue. The "Monsanto Papers" form part of the plaintiff's evidentiary arsenal. The importance of those documents to his case is summarized at para. 3 of the plaintiff's factum as follows:

> For decades, Monsanto touted Roundup as a safe herbicide, promoting and encouraging its ever-growing use not only in the agricultural context, but also for everyday residential users. At the same time, the Defendants were engaged in a concerted effort to manipulate and suppress scientific discourse on the link between glyphosate and cancer. Those efforts were exposed by the release of the "Monsanto Papers" during U.S. litigation. These papers show that Monsanto ghostwrote articles and paid supposedly independent scientists to defend glyphosate's safety.

[102] The defendants' note that Health Canada's statement acknowledged the existence of those documents and the concerns they had engendered. The federal department reported that

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[62] From p. 11.
[63] In its Proposed Re-evaluation decision.
[64] In its Re-Evaluation decision.
[65] In its response to the Notices of Objection it received.
[66] From para. 33 of the defendants' factum.

"the reviews referred to in the Monsanto Papers" had been available for evaluation by the scientists involved in the glyphosate reassessment.

[103] I turn next to the experts the parties retained. Several affidavits and reports were served and filed. Cross-examinations followed.

[104] As mentioned earlier, the plaintiff relies on reports authored by biostatistician, Dr. Christopher Portier. At para. 32 of his initial report, Dr. Portier wrote:

> In my opinion, glyphosate probably causes NHL and, given the human, animal and experimental evidence, I assert that, to a reasonable degree of scientific certainty, the probability that glyphosate causes NHL is high.[67]

[105] Dr. Portier was also of the view that the reasons advanced by PMRA in support of its conclusion concerning glyphosate were "scientifically flawed".[68]

[106] Dr. Dennis Weisenburger was also retained by the plaintiff. He described himself as a physician and pathologist "specializing in diseases of the hematopoietic and immune systems, with a special interest in" NHL. He had prepared reports in 2017 for use in U.S. based litigation. For the purposes of this proceeding, he said he had reviewed additional information that had become available and at p. 3 of his report wrote:

> These new findings provide further strong evidence that glyphosate is a cause of NHL …
>
> In conclusion, my opinion is unchanged and has been strengthened by the new evidence … Therefore, based on my expertise and my review of the scientific literature on this subject, I continue to conclude with a reasonable degree of medical certainty that glyphosate and [glyphosate-based formulations], including Roundup, can cause NHL in humans exposed to these chemicals.[69]

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[67] The undated report was appended to Dr. Portier's June 5, 2020 affidavit. The excerpt referred to above appeared under the heading "Summary of Bradford Hill Evaluation". A second report replying to those of experts retained by the defendants was attached to his February 10, 2021 affidavit. A third report was attached to an August 6, 2021 affidavit.

[68] That phrase appears at p. 144 of his initial report.

[69] The initial report is appended to a June 5, 2020 affidavit. His second report is attached to a February 11, 2021 affidavit. The third report is attached to an August 5, 2021 affidavit.

[107] The defendants, on the other hand, rely on a report authored by hematologist and oncologist Dr. Christopher Hillis.[70] His focus was NHL. Dr. Hillis said, in part:

> The NHLs represent a broad spectrum of disease that can present in any tissue of the body. There are over 60 types of lymphoma, each with distinct diagnostic and clinical manifestations …
>
> Lymphomas like all other cancers are a result of multiple genetic and cellular alterations …

[108] Dr. Hillis outlined a number of risk factors including bacterial infections, autoimmune diseases and immunosuppression and added:

> Other potential risk factors including family history, lifestyle factors and occupational and chemical exposures, are less well-established and while having some degree of reported association with lymphomas, are less clinically relevant as they do not impact diagnosis or treatment.
>
> It is unlikely, subject to limited exceptions discussed above, that a definitive causal factor can ever be identified for any given patient, as the development of any NHL is generally a multistep complex process that depends on the presence of and interaction between multiple factors.

[109] In fact, the defendants say that the evidence establishes that given their attributes, glyphosate could not possibly be a cause of some of the sub-types of NHL, even if the substance is proven to be carcinogenic.

[110] Toxicologist, Dr. Leonard Ritter, was retained by the defendants too. He was employed by Health Canada for approximately fourteen years. Despite parting ways in 1993, Dr. Ritter continued his involvement with the department and member agencies, including the PMRA, for many years.

[111] He was of the view that the plaintiff's experts had overstated the significance of the work of the IARC Working Group. Its research was centred on whether glyphosate was a cancer hazard – an agent that was capable of causing cancer. However, it did not address cancer

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[70] It is dated December 7, 2020.

risk – the probability that cancer would occur given some level of exposure to a cancer hazard.[71] At para. 37 of his report, Dr. Ritter said that the:

> PMRA regulates safe human exposure to a level that is at least 100 times lower than the level of exposure that does not cause any adverse health effects in laboratory testing. [Emphasis in original]

[112] Dr. Ritter was also of the opinion that the conclusions of the PMRA concerning glyphosate were entirely consistent with conclusions reached by regulators in many other jurisdictions.

[113] In short, the defendants argue that the plaintiff's case is a house of cards that crumbles when analyzed with the benefit of the evidence they have assembled.[72] They say that the opinions of the plaintiff's experts are, at best, generic and unhelpful. The result, the defendants submit, is that the plaintiff has failed to provide a basis in fact for his theory of liability.

[114] Nonetheless, the glyphosate debate rages in the courts too. I was told that trial of two British Columbia based civil actions was pending. Neither was being pursued on a representative basis. A number of individual actions have also been commenced in other provinces, including Ontario.

[115] There has been a great deal of litigation in the United States. Some individual actions have been tried there. Results have been mixed. In *Dewayne Johnson v. Monsanto Company*, the claimant was described as "a grounds manager for a school district and a heavy user of herbicides" who sued the manufacturer after contracting NHL. A jury awarded compensatory and punitive damages. While the jury award was reduced on appeal, Monsanto Company was ordered to pay more than $20 million U.S. in total on account of

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[71] See. p. 39 of Dr. Ritter's initial report that was appended to his December 9, 2020 affidavit.
[72] The authorities they rely upon include *Andriuk v. Merrill Lynch Canada Inc.*, 2014 ABCA 177 and *Williamson v. Johnson & Johnson*, 2020 BCSC 1746

compensatory and punitive damages.[73] Some, but not all, of the other claimants have been successful too.[74]

[116] On June 24, 2020, Bayer AG announced, "a series of agreements that will substantially resolve major outstanding Monsanto litigation, including US Roundup product liability" and other litigation. According to the news release, the settlement was intended to "bring closure to approximately 75% of the current Roundup litigation involving 125,000 filed and unfiled claims overall", including federal multi-district litigation. The settlement was dependent on court approval. That was not obtained.[75] Even if the negotiated resolution had found favour, it did not include any admission of liability.

[117] The defendants' narrative includes details concerning the products that gives rise to this action. At para. 11 of their factum they explain that the word "Roundup":

> ... encompasses at least 105 [glyphosate-based herbicide] products registered for sale in Canada since 1976. These products have had different trade names ... They are sold in different sizes and formats ... for use in different settings and by different application methods. The breadth of products involved in a class action relating to "Roundup" as defined by the Plaintiff alone render it a monster of complexity.

[118] Further, add the defendants, the concentration of glyphosate in the various products varies. Glyphosate may or may not be the only active ingredient.[76] A product called Roundup Advanced does not contain glyphosate at all.

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[73] 52 Cal. App. 5th 434 (Cal. Ct. App. 2020).

[74] As of March 30, 2023, the claims were also successful in *Alva and Alberta Pilliod v. Monsanto Co.*, Court of Appeal of the State of California, First Appellate District, Division Two, (App. Ct. 2021, A15828) and *Hardeman v. Monsanto Co.*, 997 F. (3d) 941 (9th Cir. 2021), At p. 8 of the decision in *Pilliod*, R. Nelson, Circuit Judge said the appeal arose from "the first bellwether trial for the federal cases consolidated in a multidistrict litigation." Monsanto Co. prevailed in *Clark v. Monsanto Company*, 2021 WL 5281524 (Cal. Sup. Ct., 2021) (the jury verdict is said to be currently under appeal), *Stephens v. Monsanto Company*, Case No. CIVSB2104801 (Cal. Sup. Ct., 2021) (the jury verdict is also said to be currently under appeal); *Larry and Gayle Johnson v. Monsanto Company*, Case No. 21CV10291 (Oregon, Circuit Ct., 2022); *Shelton v. Monsanto Company*, Case No. 1816-CV17026 (Missouri, Circuit Ct., 2022); *Alesi v. Monsanto Company*, Case No. 19SL-CC03617 (Missouri, Circuit Ct., 2022) and *Ferro v. Monsanto Company*, Case No. 20L-CC03678 (Missouri, Circuit Ct., 2022). There may well have been subsequent developments.

[75] *Ramirez et al. v. Monsanto Co.*, Case No. 16-md-02741-VC (California, District Ct., 2021).

[76] See paras. 14 – 15 of the defendants' factum and the sources referenced there.

[119] As is evident from the summary provided, the list of contested facts in this case is exceedingly long. Virtually every position advanced by one side is challenged by the other. So, too, is the analysis that underlies it.

[120] By way of example only, the defendants say this about the evidence of the experts retained by the plaintiff:

> ... on cross-examination, both Drs. Portier and Weisenburger admitted that certain key documents, relating to the regulatory assessments of glyphosate and Roundup, were omitted from their reports in this case. These facts call into question whether their opinions can be considered sufficiently "fair and balanced" to be admitted as expert testimony.[77]

[121] Similarly, the plaintiff challenges various aspects of the opinion evidence provided by Drs. Hillis, Ritter and Murphy.

[122] I have already mentioned the court's limited role when considering the evidence introduced during the certification stage: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, *supra*, at para. 126.

[123] Nordheimer J. (as he then was) provided a more expansive explanation in *Hague v. Liberty Mutual Insurance Co.* (2004), 21 C.C.L.I. 264 (Ont. S.C.J.), at para. 75 when he wrote:

> [I]t is inappropriate on a certification motion to engage in an evaluation of the strength or weaknesses of a given party's evidence, especially expert evidence. That is properly the function of a trial judge. Other than being satisfied that there is "some evidence" to support a party's assertions, the certification judge should not engage in a weighing of competing evidence. To do so would not only embark on a preliminary merits review, it would also ignore the recognized reality that a motion is generally an unsuitable forum in which to make such evaluations.[78]

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[77] From para. 54 of the defendants' factum. During oral argument, the defendants' counsel spent some time discussing and critiquing an article by Manisha Pahwa and others (including Dr. Weisenburger) entitled "*Glyphosate use and associations with non-Hodgkin lymphoma major histological sub-types: findings from the North American Pooled Project*", available at www.sjweh.fi One of the points made during those submissions was that while the article addresses, to some extent, "handling glyphosate" more than two days per year, it does not address lifetime usage.

[78] The principle is well established. Nonetheless, that passage was specifically cited with approval in *Price v. H. Lundbeck A/S*, 2022 ONSC 7160 (S.C.J.), at para. 94, rev'd 2020 ONSC 913 (Div. Ct.). See, too, *Darmar Farms Inc. v. Syngenta Canada Inc. et al.*, 2021 ONSC 6411 (S.C.J.), at paras. 90 – 91.

[124] None of that, of course, overrides the Supreme Court of Canada's reminder certification is a meaningful screening device. I have borne that in mind. After completing that task, I have concluded there is some basis in fact for the plaintiff's theory of liability, despite the fact its proponents face significant challenges. The required threshold has been crossed.

[125] With that, I return to the general causation questions propounded by the plaintiff. The first question he formulated was: can glyphosate be genotoxic in humans?

[126] In its re-evaluation decision, the PMRA concluded that glyphosate "is not genotoxic and is unlikely to pose a human cancer risk."[79] Dr. Portier disagrees. He is of the view that it "is absolutely clear from the available scientific data that both glyphosate and glyphosate formulations are genotoxic."[80]

[127] The defendants submit that the answer to the proposed question "is neither a necessary nor sufficient precursor to NHL."[81] They explained in para. 92 of their factum that:

> Genotoxicity is one mechanism through which a substance can potentially damage DNA in a cell. However, … exposure to a genotoxic agent does not necessarily cause genetic mutation or the development of cancer … The vast majority of our contacts with them do not cause cell mutations leading to cancer …

[128] The issue was raised with Dr. Portier during his cross-examination. The transcript includes this exchange:

> Q. So … with genotox [*sic*], you agree with me, you can't … reach a specific conclusion about causation between glyphosate and non-Hodgkin's lymphoma, right?
>
> A. Correct.[82]

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[79] Health Canada Pest Management Regulatory Authority, Re-evaluation Decision (RVD2017-01), *Glyphosate*, at p. 1.
[80] From p. 31 of his initial report.
[81] From para. 91 of the defendants' factum.
[82] Q. and A. 250.

[129] The plaintiff says that passage is selective and, when read in context, does not challenge Dr. Portier's affidavit evidence "that the determination of the genotoxicity of glyphosate is relevant to the general causation inquiry as it supports the biological plausibility that glyphosate causes … NHL."[83]

[130] In their factum, the defendants acknowledged that genotoxicity "is one mechanism through which a substance can potentially damage DNA in a cell", although "exposure to a genotoxic agent does not necessarily cause genetic mutation or the development of cancer".[84]

[131] In my view, the contest should not – indeed cannot – be determined here. If undertaken, what is supposed to be a screening process would become much more.[85]

[132] The first question formulated on behalf of the plaintiff is an appropriate one because the answer will be of use to the entire class. If negative, the action will necessarily fail because there will be no foundation for the claim. If affirmative, the plaintiff's theory will move on to and be tested at the next stage of the liability trail. Although the certification motion foundered at a later stage, in *Hollick v. Toronto (City)*, *supra*, the Supreme Court of Canada concluded that a question asking whether a landfill site emitted pollutants into the air met this requirement, even though it was only one small aspect of the liability issue.[86]

[133] That brings me to the second question advanced by the plaintiff. It contains two parts: Is glyphosate associated with non-Hodgkin's lymphoma? If yes, what are the risk ratios for non-Hodgkin's lymphoma generally and for subtypes of non-Hodgkin's lymphoma?

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[83] From para. 26 of the plaintiff's reply factum.
[84] See para. 92 of the defendants' factum.
[85] For an interesting discussion concerning and criticism of the quality of the work done by the U.S. Environmental Protection Agency, see *National Resources Defense Council et al. v. U.S. Environmental Protection Agency*, Case no. 20-70787 (9th Cir. 2022). At page 9 of its reconsideration decision the PMRA noted that "Canada and the USEPA have been collaborating on the re-evaluation of glyphosate." In response to the ruling of the U.S. Court of Appeals for the Ninth District, the USEPA prepared a response. At p. 2, the USEPA said, in part, that:

> EPA's underlying scientific findings regarding glyphosate, including its finding that glyphosate is not likely to be carcinogenic to humans, remain the same.

[86] See, too, para. 25 and *Cloud v. Canada (Attorney General)*, (2004), 73 O.R. (3d) 401 (C.A.), at para. 53.

[134] The defendants maintain that the question is framed too broadly, misworded and engages such a wide range of varied and distinct allegations that any common benefit is lost.[87]

[135] The word "associated" in the first part of this question was the subject of particular comment. It is clear that the plaintiff regards this as another step in the general causation analysis. In his initial report, Dr. Portier referred to epidemiological studies in which "the relationship between NHL and glyphosate exposure has been observed by different persons, in different places, circumstances and times." He added "that the observed association across these studies is significant and supports a positive association between NHL and glyphosate."[88]

[136] The defendants say that an association is of little utility. They referred to the decision of Perell J. on a summary judgement motion in *Wise v. Abbott Laboratories, Limited*, 2016 ONSC 7275 (S.C.J.). At para. 11, my colleague said in part:

> The Wises were successful in proving that there is an "association" between AndroGel and serious cardiovascular events, which is to say that AndroGel and serious cardiovascular events occur together more frequently than one would expect by chance. Proof of association, however, is not proof of causation because there might be [other] explanations ... for why AndroGel and serious cardiovascular events occur together more frequently than one would expect by chance.

[137] I accept that the answer to the first part of the second question does not complete the general causation phase. Nonetheless, as before, it is appropriate one because the answer will be of use to the class. If negative, the action will necessarily fail. If affirmative, the class will have moved closer to establishing general causation.[89]

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[87] They cite *Merck Frosst Canada Ltd. v. Wuttunee*, *supra*, at para. 150; *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38, at paras. 69 – 70 and *Vester v. Boston Scientific Ltd.*, 2015 ONSC 7950, at paras. 130 – 131.
[88] From p. 30 of his initial report.
[89] See, too, *Heward v. Eli Lilly & Company*, 2007 CanLII 2651 (S.C.J.), aff'd [2008] O.J. No. 2610 (Div. Ct.).

[138] Part two relates to risk ratios. The plaintiff argues that the question would yield answers that "would establish whether individual causation is presumptively proven or disproven, and identify the party that bears the onus of rebutting the presumption."[90]

[139] Lax J. addressed risk ratios in *Andersen v. St. Jude Medical Inc*[91] At para. 556, she said in part:

> Where the epidemiological evidence demonstrates a risk ratio above 2.0, then individual causation has presumptively been proven on a balance of probabilities, absent evidence presented by the defendant to rebut the presumption. On the other hand, where the risk ratio is below 2.0, individual causation has presumptively been disproven, absent individualized evidence presented by the class member to rebut the presumption.

[140] Requiring the matching of risk ratios to NHL and its sub-categories is, in my view, inappropriate. There is no basis in fact for suggesting a single risk ratio can be established for NHL "generally". As is clear from the evidence, it is not a single disease. As noted earlier, there are more than five dozen recognized subtypes. Therefore, the question "is not susceptible to a single answer that would apply to the claims of all members of the class."[92]

[141] Proposed common issue three also involves two parts: Can Significant Exposure to Roundup cause non-Hodgkin's lymphoma? If not, at what level of exposure can Roundup cause non-Hodgkin's lymphoma?

[142] The first one is appropriate. It completes the plaintiff's theory of general causation, namely, those using any of the defendants' glyphosate-based herbicides more than a minimum number of times are at risk of contracting NHL. Unlike *Organigram Holdings Inc. v. Downton*, the plaintiff is not attempting to establish a link between Roundup and

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[90] See para. 30 of the plaintiff's reply factum.
[91] 2012 ONSC 3660 (S.C.J.), at para. 556
[92] *Merck Frosst Canada Ltd. v. Wuttenee, supra*, at para. 145.

"common and very transient … conditions of nausea, dizziness, headaches and the like" that "describe general and vague symptoms with no attribution of a particular illness."[93]

[143] The PMRA reached a conclusion on glyphosate as a "cancer risk". Other regulatory authorities have too. The first part of this proposed common issue is clearly susceptible to a single answer. If the response is negative, the answer applies to all of the subtypes of NHL. If affirmative, class members generally benefit, although more nuanced answers may well be required at the specific causation stage. This case is similar to *Price v. H. Lundbeck A/S*, 2020 ONSC 913. In addressing an action involving a pharmaceutical product, the Divisional Court said, at para. 29:

> The proposed common issue of whether Citalopram can cause birth defects contains a causation question that may be common to every plaintiff and class member. That issue is whether Citalopram is teratogenic[94] at all. Can it cause any birth defects? Before one gets to whether Citalopram may cause a particular type of birth defect, first it must be found capable of causing *any* birth defects. The issue will turn on the same scientific evidence in every case. The same basic studies that are the precursors to inquiries into specific types of injury will be relevant …[95] [Italics in original]

[144] Certification occurred in *Anderson v. St. Jude Medical* even though "the issues directed at a breach of the standard of care … [could] be broken down into a series of issues relating to particular medical conditions".[96] That was also the result in *Rumley v. Canada*, despite the fact the trial judge might have been required "to provide a nuanced answer" to the common liability question because the standard of care had changed over the period

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[93] 2020 NSCA 38, at para. 60. See, too, *Merck Frosst Canada Ltd. v. Wuttunee*, *supra* and *Martin v. Astrazeneca Pharmaceuticals Plc*, 2013 ONSC 1169 (Div. Ct.).

[94] As I understand it, a teratogen is an agent that disturbs the development of an embryo, thereby causing congenital malformations or anomalies in the fetus.

[95] For a discussion of "the analytical framework" see, *MacInnis v. Bayer Inc.*, 2023 SKCA 37, at para. 116. The defendants referred me to several cases in support of their position that the so-called general causation questions should not be certified. They include *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26 and *Organigram Holdings Inc. v. Downton*, *supra.*

[96] (2003) 67 O.R. (3d) 136 (S.C.J.), at para. 40, leave to appeal denied, [2005] O.J. No. 269 (Div. Ct.).

covered by the claim.[97] Unlike other cases relied upon by the defendants, the plaintiff did not overreach in this one.[98]

[145] However, the second part does not meet the statutory requirement. It arises only if the threshold the plaintiff has proposed is insufficient. A subsequent attempt to determine some other level of problematic exposure would, in my view, result in the proceeding then becoming "a general commission of inquiry".[99] Asking the court to determine some other, previously unarticulated, basis for liability cannot be part of the court's role. If that were to be allowed, the evidentiary process would be virtually boundless. The action would be open-ended and inevitably, procedurally unmanageable and unfair.

b. The failure to warn

[146] In para. 2(e) of the Claim, the plaintiff seeks a declaration that the defendants were negligent for failing to warn Roundup users and the public of the health risks associated with Significant Exposure to Roundup.[100]

[147] Three questions are proposed that relate to that issue. They are:

> (i) Did the labels, packaging, marketing material or other material provided by the Defendants to consumers warn users that exposure to Roundup could cause non-Hodgkin's lymphoma?
>
> (ii) Did the labels, packaging, marketing material or any other material provided by the Defendants to consumers warn users to prevent exposure through the use of protective gear or other means, and that the failure to do so could cause non-Hodgkin's lymphoma?
>
> (iii) Did the Defendants or their agents take any step or steps that impeded the development of scientific knowledge, or the public's understanding of scientific knowledge regarding any of [the] common issues [relating to general causation]?

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[97] [2001] 3 S.C.R. 184, at paras. 31 – 32. The Supreme Court also noted that the *CPA* contemplates and permits the amendment of a certification order at any time: now see *CPA*, ss. 10 and 12.
[98] See, for example, *Bryson v. Canada*, 2009 NBQB 204; *Merck Frosst Canada Ltd. v. Wuttenee*, *supra* and *Dow Chemical Company v. Ring*, *supra*.
[99] *Dennis v. Ontario Lottery and Gaming Corporation*, 2013 ONCA 501, at para. 59.
[100] Allegations under the heading "Negligence (Failure to Warn)" are at paras. 73 – 80 of the Claim.

[148] The basis of a failure to warn claim was outlined by the Supreme Court of Canada in *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, at para. 23:

> The courts of this country have long recognized that manufacturers of products that are ingested, consumed or otherwise placed in the body, and thereby have a great capacity to cause injury to consumers, are subject to a correspondingly high standard of care under the law of negligence …[101]

[149] The principle was stated somewhat more broadly in *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 1942 (S.C.J.). At paras. 14 - 15, Strathy J. (as he then was) wrote:

> It is settled law that a manufacturer has a duty to warn consumers of dangers inherent in the use of the product which the manufacturer has knowledge or ought to have knowledge …
>
> Common issues arising out of allegations of breach of the duty to warn have been certified in a number of cases … [Citations omitted][102]

[150] It is the plaintiff's position that the evidentiary record provides some basis in fact for the allegation that the defendants: (i) did not inform the public of the risks involved in the use of their glyphosate-based products; and (ii) went further, by attempting to influence, if not control, the narrative concerning the potential impact of the ingredient on human health.

[151] None of these questions require an answer unless general causation is established. However, if that threshold is met, they are questions that are of benefit to the entire class. In fact, the defendants have already acknowledged that the answer to the first question in this category is "no".[103] As was explained in their factum:

> Roundup labelling has not warned that exposure … could cause NHL because no such risk exists.[104]

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[101] See, too, para. 20 and *Lambert v. Lastoplex Chemicals*, [1972] S.C.R. 569, at para. 12.
[102] For a more recent example, see *Kirsh v. Bristol-Myers Squibb, supra.*
[103] See para. 109 of the defendants' factum.
[104] *Ibid.*

[152] With respect to the second question, the defendants suggest that "each iteration of each label or other document would have to be independent assessed" because of the number of glyphosate-based herbicides marketed over the years.[105]

[153] In *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, at para. 46, the Supreme Court of Canada provided this useful instruction:

> ... a question will be considered common if it can serve to advance the resolution of every member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting answers among the members.

[154] Bluntly, I do not know how the answer to this question could be different than the first, given the defendant's position that there is no risk Roundup causes NHL. In any event, the evidence before me provides a foundation for the position that the defendants' messaging was consistent. If the questions require responses, answers will affect each class member, or nearly so.

[155] The third question relates to the Monsanto Papers. The defendants' take this position:

> The evidence – downloaded from the internet and merely appended to a clerk or assistant's affidavit – is multiple levels of hearsay and cannot be relied upon for the truth of its contents or to establish any basis in fact for a proposed common issue.[106]

[156] With respect, I do not know why this question needs to be asked in the context of the general causation analysis.

[157] The statement Health Canada released on January 11, 2019, made specific mention of the Monsanto Papers. Health Canada said that the work of its scientists included "the reviews referred to in" them. Nonetheless, the PMRA reached – and following a reconsideration

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[105] From para. 110 of the defendants' factum.
[106] From para. 111 of the defendants' factum.

process confirmed - a conclusion which is unfavourable to the plaintiff in this proceeding.[107]

[158] At the stage these questions arise, Health Canada's communication demonstrates that what matters is the correctness of the scientific conclusion, not steps that may have been taken along the way by the defendants to influence the dialogue. In my view, this question is not properly characterized as a common issue.

[159] However, as I will endeavour to explain later in these reasons, despite that conclusion things alleged to form part of the Monsanto Papers may well be relevant to a subsequent common issue that does require determination.

*c. **Battery***

[160] The questions proposed under this heading do not arise given my conclusion that the plaintiff does not have a cause of action in battery.

*d. **Negligence***

[161] In paras. 2 (c) and (d) of the Claim, the plaintiff seeks declarations that the defendants: (i) breached their duty of care to the Class Members; and (ii) were negligent in the research, development, design, manufacture, testing, distribution, sale and marketing of Roundup products.[108]

[162] The following common issues are proposed that relate to the allegations of negligence:

(i) Did the Defendants owe a duty of care to Class Members?[109]

(ii) If the answer … is "yes", what was the standard of care applicable to the Defendants?[110]

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[107] The EFSA referred to them too. Two of the scientific review articles mentioned in the Monsanto Papers had been considered during the European Union assessment of glyphosate. The EFSA said that after an investigation, it determined "that even if the allegations regarding ghostwriting proved to be true, there would be no impact on the overall assessment as presented in the EFSA Conclusion on glyphosate."

[108] Allegations under the heading "Negligence (Negligent Design)" are at paras. 69 – 72 of the Claim.

[109] Para. 69 of the Claim addresses the duty of care.

[110] Para. 70 of the Claim addresses the standard of care.

(iii) Did the Defendants breach that standard of care? If so, when and how?[111]

[163] These questions flow from those that precede them. It seems from the evidence that the defendants' approach to glyphosate did not change despite the passage of time, the number of products or their composition.

[164] The defendants' objections to this group of proposed questions are not new: glyphosate is not carcinogenic and even if it is, the plaintiff's challenge is too broad in relation to time, too numerous in regard to products and too varied in terms of NHL.

[165] I disagree. If the defendants' position is proven to be wrong, there may be widespread consequences. In my view, there is a sufficient foundation for a finding of commonality.

[166] The comments of Belobaba J. in *Dine v. Bioemet Inc.* at para. 42 apply here:

> The fact that the common issues trial judge may have to identify and apply what could be a changing and evolving standard of care in the design of [the product] is not a roadblock. Courts regularly certify claims for negligence where the standard of care has changed over the course of a multi-year class period. It is also important to note that common issues asking if the defendants breached the standard of care, and if so, when, have been certified in other class actions ... [Citations omitted][112]

[167] Furthermore, the calculus is not altered by the fact Canada has enacted legislation that expressly acknowledges that "it is in the national interest and the primary objective of the federal regulatory system ... to prevent unacceptable risks to individuals ... from the use of pest control products".[113]

[168] I return to *Dine v. Bioemet Inc.* At para. 43, Belobaba J. added:

> ... regulatory compliance is not dispositive of common law duties. Health Canada is an imperfect regulator and Canadian courts have repeatedly

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[111] Para. 72 of the Claim addresses the breach of the standard of care.
[112] 2015 ONSC 7050 (S.C.J.).
[113] *Pest Control Products Act*, S.C. 2002, c. 28.

> certified class actions involving medical products that were not recalled and were still on the market. [Citations omitted][114]

[169] The principle does not change because the regulator acted pursuant to and in accordance with expansive legislation that recites laudable goals.

[170] All three negligence questions are common issues. They involve the determination of facts and the application of legal principles that are relevant to and affect the interests of the proposed class members.[115]

e. Aggregate damages

[171] The question proposed in relation to aggregate damages was this:

> If the Defendants have committed a battery or were negligent, can an award of aggregate damages be made to Class Members from the sale of Roundup in Canada?

[172] During argument in reply, I was appropriately asked to disregard the words "or were negligent".[116] In this case, it is inconceivable that damages could be assessed in the aggregate without proof by individual members of the class.[117]

[173] Battery is the only basis for an award of aggregate damages under s. 24 of the *CPA* that remains. Given my earlier conclusion that a cause of action in battery has not been pleaded, this is not an appropriate common issue.

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[114] 2015 ONSC 7050 (S.C.J.). Many other certification orders have been granted despite regulatory involvement and approval. They include *Anderson v. St. Jude Medical Inc.*, *supra*; *Ann Schwoob et al. v. Bayer Inc.*, 2013 ONSC 2207 (S.C.J.); *Drynan v. Bausch Health Companies Inc.*, *supra*; *Martineau v. Bayer Cropscience Inc.*, 2018 QCCS 634 and *Kirsch v. Bristol-Myers Squibb*, *supra*.

[115] *MacKinnon v. Pfizer Canada Inc.*, 2021 BCSC 1093, at paras. 139 – 140.

[116] See *Palmer v. Teva Canada Ltd.*, *supra*, at para. 291 where Perell J. said that "a plaintiff must be able to prove all the elements of his or [her] cause of action at the common issues trial to have a common issue about aggregate damages." In negligence actions, proof of damage is required.

[117] *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115, at paras. 67 – 69 and 76. The plaintiff relied on *Good v. Toronto Police Services Board et al.*, 2016 ONCA 250, at para. 75 and *Francis v. Ontario*, 2020 ONSC 1644 (S.C.J.), at paras. 599 - 600. With respect, those cases are not analogous.

[174] If I am wrong, provided liability is established, the aggregate damages provisions could still be applied at trial if the presiding judge decided that was justified.[118]

f. Disgorgement

[175] Under this subheading, the plaintiff proposes the following common issues:

> (i) Are the Defendants, or any of them, liable to account to the Class Members for the profits, if any, that they obtained from the sale of Roundup in Canada?
>
> (ii) If the answer … is "yes", what amount of profits must be disgorged?

[176] The remedy the plaintiff seeks is called disgorgement and has been said to refer:

> … to awards that are calculated exclusively by reference to the defendant's wrongful gain, irrespective of whether the plaintiff suffered damage at all …[119]

[177] The difference between compensatory and disgorgement damages was well explained by James Edelman in *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property*, at p. 103:

> … the only difference … is that the former aim to put the claimant in a position as if the wrong had not occurred and the latter aim to put the defendant in that position.[120]

[178] The Supreme Court of Canada addressed disgorgement as a potential remedy in a negligence action in *Atlantic Lottery Corp. Inc. v. Babstock.* Writing on behalf of the majority, Brown J. said at para. 33:

> It is important to consider what it is that makes a defendant's negligent conduct wrongful. As this court has maintained, "[a] defendant in an action in negligence is not a wrongdoer at large: he is a wrongdoer only in respect of damage which he actually causes to the plaintiff" … There is no right to be free from the *prospect* of damage; there is only the right not to *suffer*

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[118] *Pro-Sys Consultants v. Microsoft*, *supra*, at para. 134; *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921, at para. 78.
[119] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at para. 23.
[120] Portland, OR.: Hart Publishing, 2002. Quoted with approval by Brown J. in *Atlantic Lottery Corp. Inc. v. Babstock*, *supra*, at para. 156.

> damage that results from exposure to unreasonable risk. Granting disgorgement for negligence without proof of damage would result in a remedy "arising out of legal nothingness" … It would be a radical and uncharted development … [Citations omitted, italics in original]

[179] That principle applies to this case. There is more to be done even if all elements of negligence and/or a failure to warn are proven. Proof of harm is still required. Understandably, that topic is not something the plaintiff proposes as a common issue. It is quintessentially one that requires individual analysis.[121] There is simply no basis in fact or in law for this question.

g. Punitive damages

[180] The proposed common issue is:

> Are the Defendants, or any of them, liable to pay punitive damages to the Class Members having regard to the nature of their conduct and, if so, in what amount?

[181] If awarded, punitive damages are "founded on the conduct of the defendant, unrelated to its effect on the plaintiff."[122] In *Whiten v. Pilot Insurance Co.*, Binnie J. explained that the objective of punitive damages is to punish the defendant, rather than compensate a plaintiff and:

> … are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency" …[123] [Citations omitted]

[182] A claim to such an award has been included in approved lists of common issues, particularly where allegations of negligence are "not specific to any one victim but rather to the class of victims as a group."[124]

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[121] *Carter v. Ford Motor Company of Canada, supra*, at paras. 168 - 170
[122] *Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C.S.C), at para. 48, cited with approval in *Rumley v. Canada, supra*, at para. 34.
[123] 2022 SCC 18, at para. 36.
[124] *Rumley v. Canada, supra*, at para. 34.

[183] The defendants submit that the plaintiff has not met the required evidentiary standard because it relies on evidence which is, in its entirety, inadmissible. At para. 131 of their factum, they say:

> News articles and commentary written by U.S. plaintiff's counsel are multiple levels of hearsay and cannot be accepted either for the truth of their contents or as "some basis in fact".

[184] That is not all that the plaintiff relies upon. As mentioned, regulatory bodies have addressed the Monsanto Papers. Some of the documents included in them have been specifically considered in their analysis.

[185] In upholding the jury's decision to award punitive damages in *Pilliod v. Monsanto Company et al.*, Smith J. of the Superior Court of California said in part:

> The jury could have found that plaintiffs proved by clear and convincing evidence that Monsanto's actions were reprehensible…
>
> …
>
> … In this case there was clear and convincing evidence that Monsanto made efforts to impede, discourage, or distort scientific inquiry and the resulting science.[125]

[186] The defendants' submission that a punitive damages claim lacks any evidentiary foundation is wide of the mark. There is a wealth of material that is admissible for the limited purpose of establishing some basis in fact for the allegation that one or more of the defendants engaged in class-wide behaviour that, if proven, deserves judicial condemnation and an appropriate sanction.[126]

[187] The claim to punitive damages is, indeed, a common issue.

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[125] 2019 Cal. Super. LEXIS 843 (Cal. Sup. Ct., App. Div.), aff'd 67 Cal. App 5th 591 (Cal., Ct. of Appeal, 2021).
[126] *Vester v. Boston Scientific Ltd.*, *supra*, at paras. 31 – 33; *Johnson v. Ontario*, 2016 ONSC 5314 (S.C.J.), at para. 65; *Bigeagle v. Canada*, 2021 FC 504, at para. 47; *Weremy v. The Government of Manitoba*, 2021 MBCA 34, at para. 46; and *Pinon v. Ottawa (City)*, 2021 ONSC 488 (S.C.J.), at paras. 15 – 17.

h. Interest

[188] The plaintiff contemplates the following final common question:

> Are the Defendants, or any of them, liable to pay pre-judgment interest and post-judgment interest, and if so, in what amount?

[189] It is clear that this issue was formulated with aggregate damages in mind.[127] Given my conclusion with respect to that aspect of the matter, the question concerning interest falls too. Whether and to what extent pre- or post-judgment interest is payable is dependent on the assessment of damages on an individual basis.[128]

v. Is a class proceeding the preferable procedure? (*CPA*, s. 5(1)(d))

[190] Certification is also conditional on the plaintiff establishing a basis in fact for concluding a class proceeding would be the preferable procedure for the resolution of the common issues: *CPA*, s. 5(1)(d).

[191] In order to meet that requirement, the court must be satisfied that, at a minimum: (i) a class proceeding is superior to all reasonably available means of determining the entitlement of class members to relief or addressing the conduct of the defendants that is in issue, including the case management of individual claims; and (ii) the questions of fact or law common to the class members predominate over questions affecting only individual class members: *CPA*, s. 5(1.1)(a) and (b).

[192] Writing for the Supreme Court of Canada in *AIC Limited v. Fischer*, Cromwell J. said, at para. 22, that the preferability inquiry is:

> ... to be conducted through the lens of the three principal goals of class actions, namely, judicial economy, behaviour modification and access to justice. This should not be construed as creating a requirement to prove that the proposed class action will *actually* achieve those goals in a specific case.[129] [Italics in original]

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[127] That is apparent from para. 73 of the plaintiff's factum.
[128] *Ramdath v. George Brown College of Applied Arts and Technology*, *supra*, at para. 124.
[129] 2013 SCC 69.

[193] Perell J. elaborated in in *R.G. v. The Hospital for Sick Children*, 2017 ONSC 6545 (S.C.J.), at para. 138 when he said:

> In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s) and their importance in relation to the claim as a whole; (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the [*CPA*]; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the [*CPA*]; and (g) the rights of the plaintiff(s) and defendant(s). [Citations omitted]

[194] The defendants submit[130] that none of the objectives of a class proceeding would be met if this action was certified because: (a) it does not possess the requisite degree of commonality given the breadth of the product lines, number of subtypes of NHL and range of alleged harms involved; (b) numerous complex individual issues would remain, including specific causation and damages[131]; and (c) access to justice concerns do not arise as evidenced by the fact sixteen individual actions have been commenced across Canada so far.[132]

[195] I disagree. The fundamental and class-wide issue is whether glyphosate is carcinogenic. As discussed, if the plaintiff's theory is not proven, the action dies. If the plaintiff succeeds in establishing that threshold position, the remaining general causation questions arise and from the plaintiff's perspective, must be answered affirmatively too.

[196] Important questions affecting individual class members would remain but nonetheless, in my view, the common ones predominate.[133]

[197] In *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534, at paras. 27 - 29, McLachlin C.J. summarized the three advantages of class, rather than individual,

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[130] At paras. 132 – 134 of their factum.
[131] *Hollick v. Toronto (City)*, *supra*, at paras. 32 – 34.
[132] Those were listed in Appendix "2" to the defendants' factum.
[133] See, too, *Kirsh v. Bristol-Myers Squibb*, *supra*, at paras. 91 - 92. Furthermore, the court is statutorily prohibited from refusing to certify a case as a class proceeding solely because damages are sought which would require individual assessment after determination of the common issues: *CPA*, s. 6 item 1.

proceedings: judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis, improved access to justice by making economical the pursuit of claims that would be too costly to pursue individually and ensuring that potential wrongdoers do not ignore their public responsibility.

[198] All of those apply to this case.

[199] I do not agree with the defendants that the commencement of sixteen individual actions in Canada supports the conclusion that those wanting to assert a claim against the defendants are able to do so. Bluntly, the number does not seem significant. In *Hardeman v. Monsanto Company*, *supra*, the United States Court of Appeals for the Ninth Circuit noted that since 2015, Monsanto Company had been sued by "thousands of cancer victims … in state and federal court". That statement is consistent with the number set forth in the press release Bayer AG issued following conditional settlement of U.S. based glyphosate litigation.

[200] Even if the number of individual actions in Canada is high, I am unable to assess them. Counsel for the plaintiff told me that several of the Ontario actions have been paused pending the result of this motion. Counsel for the defendants advised that two British Columbia based proceedings were scheduled for trial in 2023. I do not know if they were heard.

[201] In any event, many proceedings have been certified despite the fact that individual actions are also ongoing.[134]

[202] Lawsuits of this kind are not for the faint of heart. As is clear from the experience in the United States so far, glyphosate litigation has been hard fought.

[203] That applies to this action too. While obviously of significant importance, a certification motion is procedural only. Even if granted, a certification order does not determine the merits of a proceeding: CPA, s. 5(5). Yet, the record before me consists of more than

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[134] See, for example, *Tiboni v. Merck Frosst Canada Ltd.*, *supra*; *Vester v. Boston Scientific Ltd.*, *supra*; *Barwin v. IKO Industries Ltd.*, 2012 ONSC 3969 (S.C.J.) and *Johnson v. Ontario*, *supra*.

17,000 pages of factual and legal material. Every aspect of the statutory test was the subject of written and oral argument. It does not appear that any expense was spared.

[204] Undoubtedly, a class proceeding provides easier access to justice. It is bound to be more economical than the pursuit of multiple individual claims.

[205] The experience in the United States demonstrates the perils of individual actions. Several have gone to trial. Judges and juries in various jurisdictions have been involved. The results have varied because contradictory findings have been made, even on questions related to general causation.

[206] Judicial resources in this country are scarcer than ever.[135] Fewer judges will be involved if this action is certified. Determination of common issues in a class proceeding will facilitate case management,[136] fact-finding, the necessary legal analysis and eliminate the risk of inconsistent verdicts. If, at some point, the parties negotiate a settlement, judicial approval can be sought under the *CPA*.[137] Upon court approval, a settlement binds every member of the class who has not opted out, unless the court orders otherwise.[138]

[207] With respect to social responsibility, I turn to the sage words of Cullity J. in *Tiboni v. Merck Frosst Canada Ltd.* On that topic, he wrote at para. 110:

> As in other cases of products liability, a successful prosecution of this case as a class proceeding would act as a warning, and as a deterrent, to manufacturers and vendors tempted to subordinate their obligations to consumers – and their duties of care – to their profit-making objectives. To that extent, the continuation of the proceeding as a class action will accord with the objective of behavioural modification.

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[135] I discussed the problem in *Johnson v. Ontario*, *supra*, at para. 138. The problem has gotten worse.
[136] Ss. 34 and 35 of the *CPA* confer broad procedural powers. For a discussion of them, see *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781, at paras. 62 – 64.
[137] *CPA*, s. 27.1.
[138] *CPA*, s. 27.1(4).

[208] I agree. A successful class proceeding would undoubtedly generate a more forceful message than one emanating from one or more individual actions. As counsel for the plaintiff pointed out in their reply factum:

> If the Plaintiff's allegations are borne out, but only a fraction of class members can pursue individual litigation, behaviour modification is undermined.[139]

vi. Is there an adequate representative plaintiff? (*CPA*, s. 5(1)(e))

[209] In order to fulfill the requirements of s. 5(1)(e) of the *CPA* the court must be satisfied there is a representative plaintiff: (i) who would fairly and adequately represent the interests of the class; (ii) who has produced a workable litigation plan; and (iii) whose interest is not in conflict with that of other class members, insofar as the common issues are concerned.

[210] The second element is the only one in issue. The adequacy of the plaintiff's litigation plan was addressed by the defendants at para. 136 of their factum. They acknowledged:

> … that whether or not the action ought to be certified is unlikely to turn on the contents of the Plaintiff's proposed Litigation Plan. However, in this case, the Litigation Plan is highly cursory. It fails to meaningfully address the complexities in both the common issues and individual issues phases. This underscores the Plaintiff's failure to recognize the substantial problems with his proposed class action.

[211] Specific deficiencies were not identified.

[212] Section 5(1)(e)(ii) requires that the litigation plan set out a workable method of: (i) advancing the proceeding on behalf of the class; and (ii) notifying class members of the proceeding.

[213] The litigation plan in this case does both things despite the fact it is "something of a work in progress".[140] That is unsurprising given the current status of this action. As in *Kirsh v. Bristol-Myers Squibb*, in the event the plaintiff succeeds on the common issues:

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[139] From para. 47.
[140] *Cloud v. Canada (Attorney General)*, *supra*, at para. 95.

> Everyone acknowledges that there will be a need for some form of individualized inquiry … But the extent of those procedures may have to wait to see what transpires with the general causation issues that will be determined in common. Whether a simple questionnaire designed by a claims administrator will suffice, or more elaborate mini-trials will have to be conducted, might well turn on the common issues judge's findings and reasons for decision.
>
> Accordingly, it is reasonable to wait in designing a litigation plan for post-trial inquiry …[141]

[214] The plaintiff's litigation plan addresses, on a preliminary basis, determination of individual issues. If general causation is established, at some point it will "undoubtedly have to be amended".[142] Nonetheless, at this time, it contains all of the information that could reasonably be expected and meets the "workable" standard the subsection requires.[143]

C. Conclusion and disposition

[215] For the reasons given, I am satisfied that the requirements of s. 5(1) of the *CPA* have been met. Consequently, this action is certified as a class proceeding. The proposed definitions of "Class", "Class Members", "Roundup" and "Significant Exposure" are approved. The common issues are:

(i) Can glyphosate be genotoxic in humans?

(ii) Is glyphosate associated with non-Hodgkin's lymphoma?

(iii) Can Significant Exposure to Roundup cause non-Hodgkin's lymphoma?

(iv) Did the labels, packaging, marketing material or other material provided by the defendants to consumers warn users that exposure to Roundup could cause non-Hodgkin's lymphoma?

(v) Did the labels, packaging, marketing material or any other material provided by the defendants to consumers warn users to prevent

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[141] *Supra*, at para. 98.
[142] *Cloud v. Canada (Attorney General)*, *supra*, at para. 95.
[143] *Tiboni v. Merck Frosst Canada Ltd.*, *supra*, at para. 117.

exposure through the use of protective gear or other means, and that the failure to do so could cause non-Hodgkin's lymphoma?

(vi) Did the defendants owe a duty of care to Class Members?

(vii) If the answer to question (vi) is "yes", what was the standard of care applicable to the defendants?

(viii) Did the defendants breach that standard of care? If so, when and how?

(ix) Are the defendants, or any of them, liable to pay punitive damages to the Class Members, having regard to the nature of their conduct and, if so, in what amount?

[216] If the parties are unable to resolve the issue of costs, they may serve, file and upload to Caselines cost submissions according to the following schedule:

(a) By the plaintiff, by no later than the close of business on January 5, 2024;

(b) By the defendants, by no later than the close of business on January 16, 2024; and

(c) Any reply by the plaintiff, by no later than the close of business on January 24, 2024.

[217] The initial cost submissions referred to in subparagraphs (a) and (b) shall not exceed ten (10) and the reply submissions shall not exceed five (5) pages in length.

Grace J.

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFREY DEBLOCK v. MONSANTO COMPANY ULC, et al.

REASONS FOR DECISION

Grace J.

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