

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2010 SKQB 108**

Date: **2010 03 12**
Docket: Q.B.G. 1667 of 2008
Judicial Centre: Regina

BETWEEN:

AMY CATHERINE WHITE AND
MICHELLE NEX

PLAINTIFFS
(RESPONDENTS)

- and -

GLAXOSMITHKLINE, INC.

DEFENDANT
(APPLICANT)

Brought under *The Class Actions Act*, S.S. 2001, c. C-12.01

Counsel:

Robert W. Leurer, Q.C. and
Khurram Awan
E.F. Anthony Merchant, Q.C.
and Nicholas Robinson

for the defendant (applicant)

for the plaintiffs (respondents)

JUDGMENT
March 12, 2010

BALL J.

[1] The plaintiffs have applied for certification of a proposed multi-jurisdictional class action involving Paxil (paroxetine hydrochloride), a prescription drug approved in Canada for the treatment of depression, anxiety disorder, panic disorder, and other conditions. The plaintiffs claim that Paxil is ineffective and harmful to persons under 18 years of age.

[2] The plaintiffs' motion for certification seeks an order appointing John-Paul Field as a representative plaintiff for the class. An affidavit sworn by Mr. Field on December 7, 2009 has been filed in support of the motion for certification. The defendant applies for leave to cross-examine Mr. Field on his affidavit.

[3] The defendant's application is brought pursuant to Rule 317 of *The Queen's Bench Rules*, which states:

317(1) Upon any motion or petition evidence may be given by affidavit, but the court may, on the application of either party, order the attendance for cross-examination of the person making such affidavit.

(2) The costs of any cross-examination under subrule (1) shall be borne by the party applying for the cross-examination.

[4] Counsel for the plaintiffs, Mr. Merchant, opposes the application on the basis that an order for cross-examination under Rule 317(1) is an exceptional discretionary remedy that should not be granted routinely in any action, including a proposed class action. Mr. Merchant submits that this claim is simple and straightforward: children and adolescents under 18 took Paxil, it was ineffective and they want their money back. He says that there is no need for clarification through cross-examination.

[5] Mr. Merchant also submits that the details and validity of Mr. Field's personal claim (including whether or not he suffered adverse effects from the use of Paxil) are irrelevant to the common issues; that Mr. Field has already disclosed all of his medical records so that further cross-examination is unnecessary; and, that concern about the suitability of Mr. Field to act as a representative plaintiff is the type of issue that every defendant in every proposed class action could put forward as justification for leave to

cross-examine. The essence of his argument is, therefore, that if cross-examination is permitted in this case it will be permitted in every case and the requirement for leave under Rule 317 will become meaningless.

[6] The question of when a court should permit cross-examination on affidavits filed in support of class action certification motions was thoroughly considered by Smith J. (as she then was) in *Hoffman et al v. Monsanto Canada Inc. et al* (2003), 242 Sask. R. 286 (Sask. Q.B.). In that decision, the court considered the traditional test for cross-examination in affidavits under Rule 317(1) and then stated:

B. Is there an enhanced right of cross-examination under the Class Actions act?

[11] It is my view that the general principles described above apply in the context of an application for certification under the *Act*. Nonetheless, the desirability or necessity for cross-examination, and considerations of potential injustice to the parties must, of course, be judged in the context of the application in support of which the affidavits in question are filed. There are a number of characteristics of a certification application that may, in some contexts, enhance the claim of an application for leave to cross-examine.

[12] First, and most obviously, the criteria that must be met for a successful application for certification as a class action are set out in s. 6 of the *Act*, quoted above. The applicant for certification must establish, *inter alia*, the existence of an identifiable class, in connection with the issues that the plaintiffs propose to certify as common issues, the existence of common issues, and whether a class action is the preferable procedure for resolving these common issues. The proposed representative plaintiffs must establish that they are appropriate.

[13] In applying the general principles relevant to the discretion to be exercised pursuant to Rule 317(1), it must therefore be asked whether the cross-examination sought will assist in the ultimate determination of the s. 7 enquiry. Section 7(2) of the *Act* makes it clear that an order certifying an action as a class action is not a determination of the merits of the action. Accordingly, cross-examination going solely to the merits of the plaintiff's claim is not permissible. Overlap may, however, occur,

between evidence relevant to the merits of the action and evidence relevant to one or more of the s. 6 criteria.

[14] In a previous ruling in this action respecting the propriety of certain affidavit material filed by the plaintiffs (233 Sask. R. 112), the Court emphasized the importance of providing, on the certification motion, a proper evidentiary record for the resolution of these issues, commenting, in part, as follows:

[42] I have concluded that the better position is that, on the certification application, evidence as to the merits of the action is admissible only insofar as that evidence is also relevant to an issue to be determined on the motion. Overlap may, however, occur, as there is an onus on the proposed representative plaintiff to provide some evidentiary basis tending to show that he or she is a proper representative of the proposed class, which may include evidence that he or she has suffered a loss or damage, and an onus to establish the definition of the proposed class and proposed common issues, which may require some evidence that other members of the proposed class have suffered loss or damage sufficiently similar to that of the proposed representative plaintiff to raise common issues.

[43] In addition, it is now widely accepted that, despite the mandatory language of s. 6 ('The court *shall* certify an action as a class action ... if the court is satisfied that [the five criteria are satisfied]'), the court has relatively wide discretion in relation to the requirement in ss. 6(d) of the Saskatchewan *Act* that a class action be the preferable procedure, and that the exercise of this discretion requires consideration of the scope and nature of the proposed litigation as a whole and a balance of the relevant factors. Accordingly, the desirability of providing, on the certification motion, as complete a picture as possible of the proposed action, including the scope of the issues raised both in the claim and in defence, has generally been viewed by the courts as helpful in determining whether class action proceeding is the preferable procedure ... (emphasis in original text)

[15] Certification of an action as a class action has a significant affect on the defendants, for defence of such an action absorbs considerable resources. They are entitled to defend such an application fully and this right entails the right to explore matters raised within the plaintiff's affidavits, including matters pertaining to the deponents themselves, for the purpose of clarifying what may be ambiguous, expanding or

narrowing the scope of what is said in the affidavit, or exploring matters going to the credibility of the affiant.

[16] Further, the issues to be resolved on a certification application are complex and trial of an issue is not a practical alternative where there is a conflict in the evidence. Thus, while the jurisprudence from other Canadian jurisdictions which do not have a restrictive rule comparable to our Rule 371(1) must be read with some caution, many decisions relating to the propriety of specific questions sought to be put by way of cross-examination of an affidavit in support of an application for certification as a class action are relevant and helpful, for the criteria for certification in those jurisdictions are closely parallel to our own.

[7] The above reasoning in *Monsanto, supra*, has been expressly adopted and applied by Barclay J. in *Cole et al v. Prairie Centre Credit Union Ltd. et al* (2007), 295 Sask. R. 159 (Sask. Q.B.), by Zarzeczny J. in *Brooks v. Canada (Attorney General)* 2009 SKQB 75 (Sask. Q.B.) and by Popescul J. in *Schroeder et al v. DJO Canada Inc. et al* (2009), 334 Sask. R. 258 (Sask. Q.B.). It will also be adopted and applied in this case.

[8] In *Schroeder, supra*, Popescul J. permitted cross-examination with the following comments:

[49] I adopt the approach, analysis and reasoning in *Monsanto* and the cases that have followed it. The general principles relating to when a court ought to exercise its discretion and grant a request to permit cross-examination on an affiant's affidavit apply to class action proceedings. Specifically, although there is no inherent right to cross-examine on an affidavit, leave ought to be granted, albeit not routinely, in appropriate circumstances. An appropriate circumstance, in the context of a certification application, would be when the cross-examination sought would assist in determining the outcome of a s. 6 inquiry.

[50] In the circumstances of this case, I am convinced that the cross-examinations sought will assist in the ultimate determination of the certification application that it is therefore appropriate to exercise my discretion in favour of granting the requested relief. Although determining issues such as the adequacy of the representative plaintiffs may be relatively simple, the question of whether common issues exist

and predominate over other issues and whether the class action procedure is the preferable procedure may require a more extensive record. Permitting the requested cross-examinations will ensure that an adequate evidentiary record is before the Court. Accordingly, the defendants' request to cross-examine the plaintiff affiants is granted.

[9] In their conclusions, all of the above decisions support the view that leave to cross-examine under Rule 317 is granted more readily in proposed class actions than it is in other civil proceedings. None support the proposition that a proposed representative plaintiff is immune from cross-examination in respect of his or her individual claim. In *Hoffman et al v. Monsanto Canada Inc. et al* (2003), 233 Sask. R. 112 (Sask. Q.B.), Smith J. reviewed a number of authorities and concluded at paras. 46 and 47:

[46] These authorities support the view that, on a certification application, the court will be assisted by as full a picture as possible of the nature and scope of the proposed litigation, including an indication of the nature of the evidence that may be relevant to both the claim and the defence with respect to both the common and the individual issues.

[47] Finally, this view is also reflected, in Saskatchewan, in our Rule 82(2)(b), which requires an application for certification to be supported by an affidavit:

(b) setting out the *basis* of the proposed representative plaintiff's personal claim, where applicable, and the reason the proposed representative plaintiff believes that common issues exist for the rest of the members of the class. (Emphasis added)

[10] In summary, cross-examination of a proposed representative plaintiff may explore matters pertaining to his or her individual claim in the context of issues that must be determined by the court pursuant to ss. 6 and 6.1 of *The Class Actions Act*, S.S. 2001, c. C-12.01. Every case must be determined on its own facts.

[11] In a number of decisions, evidence elicited in cross-examination of a proposed representative plaintiff has been relied upon by the court where it established, despite assertions to the contrary in his affidavit, that the affiant had no wish to act as a representative plaintiff, no understanding of the requisite duties and responsibilities, or no knowledge and experience in the litigation process. See: *R. v. Spurr* 2009 SKQB 478, [2009] S.J. No. 729, per Laing CJQB; *Frey et al v. Bell Mobility et al*, 2006 SKQB 328, 282 Sask. R. 1 per Gerein J.; *Hoffman et al v. Monsanto Canada Inc. et al* (2005), 264 Sask. R. 1 per Smith J. In those cases, cross-examination provided insight into situations where the person signing the affidavit knew very little about, or actually disagreed with, its contents.

[12] By way of example in this case, if cross-examination were to establish that the common issues exclude recovery for all of the matters that are important to Mr. Field, or if his personal claim is in conflict with the claims of class members, it would be relevant to his capacity to fairly and adequately represent the interests of the class as required by s. 6(1)(e)(i) of the Act.

[13] I turn now to the material before the court on this application. In my view, there are a number of statements contained in Mr. Field's affidavit which, when considered in relation to the statement of claim and the motion for certification, invite clarification. Taken as a whole, they are relevant to issues that must be determined by the court under ss. 6 and 6.1 of *The Class Actions Act*. Accordingly, evidence adduced by way of cross-examination on his affidavit might well complete the evidentiary record and be of assistance to the court.

[14] I will not attempt to list all such statements. Rather, I will comment on Mr. Field's proposed role within the larger structure of the case. Mr. Merchant asserts that the claim is simple. He says that it is made by or on behalf of persons who took Paxil when they were under 18 years of age, that the drug was ineffective and that "they want their money back". However, the claim appears to be more than that. The statement of claim defines the proposed class as follows:

11. The Plaintiffs bring this action on behalf of themselves, their families, and other similarly situated members of the Class and seek compensation for their purchase of an ineffective and unsafe drug.

12. The Class includes all persons who used or ingested Paxil while under the age of 18 and all persons, corporations, and other entities including, but not limited to, health care plans, the public and private health care insurers, and provincial health departments, who purchased, acquired or paid for Paxil for the treatment of any person under the age of 18 who are:

- (a) resident in the province of Saskatchewan; or
- (b) resident outside of Saskatchewan,

13. The Class seeks redress and compensation from the Defendants for economic loss and other harms and damages incurred as a result of the Defendants' manufacture, marketing and distribution of Paxil, an unsafe and ineffective pharmaceutical product, to members of the Class.

[15] The motion for certification contains a similar description of the proposed class:

(b) defining the class as "all persons who used or ingested Paxil while under the age of 18 and all persons and entities including, but not limited to, public and private health care insurers, who purchased, acquired or paid for Paxil for the treatment of any person under the age of 18, wherever resident".

[16] The affidavit of Mr. Field, who resides in British Columbia and asserts that he took Paxil when he was under 18, contains the following statements concerning his proposed role as a representative plaintiff for members of the proposed class:

2. I was born on September 18th, 1983 in British Columbia and have resided in British Columbia for most of my life. I took the prescription drug Paxil for anxiety disorder and panic attacks and other psychiatric conditions for approximately 3 years while I was under 18 years of age. My condition was characterized by agoraphobia and social phobia.

...

9. My parents purchased Paxil on my behalf from a variety of stores throughout British Columbia. Out of pocket expenses were incurred to buy Paxil and my parents' insurance covered the balance of the purchase price of Paxil.

...

16. On the basis of the article from the British medical journal The Lancet, attached to this my Affidavit as **Exhibit "D"**, I believe that the Defendant's behaviour was "an abuse of the trust" I put in my physicians and that Paxil had global sales of US \$4.97 billion in 2003.

[17] As stated in his affidavit neither Mr. Field or his parents paid for the Paxil he took. It was paid for by an insurer. Accordingly, any claim for reimbursement of the purchase price is necessarily brought by or on behalf of his insurer. If that is also true for the other individuals referred to in paragraph 11 of the statement of claim, then for all practical purposes the claims for reimbursement are in reality being advanced, not by the individuals under 18 who took Paxil, but by the "corporations and other entities", including the health care plans, health care insurers and provincial health departments referred to in paragraph 12 of the statement of claim. Those same entities are referred to as "public and private health care insurers" in clause (b) of the motion for certification quoted at paragraph 15 above

[18] These facts alone are relevant to a consideration of whether Mr. Field would be an appropriate person to fairly and adequately represent the interests of the class, and whether a class action would be the preferable procedure for the resolution of the common issues. They are therefore relevant to the court's inquiries under s. 6 of *The Class Actions Act*. However, it is when they are considered in relation to other statements in Mr. Field's affidavit, in relation to allegations contained in the statement of claim and in relation to the common issues the plaintiffs seek to have certified that the role of Mr. Field as proposed representative plaintiff becomes somewhat confusing.

[19] The statement of claim contains a number of allegations that Paxil was not just ineffective, but harmful to persons under 18. Examples include the following:

26. GSK misrepresented information concerning the safety of Paxil. Defendants found through their own clinical trials that there was an increased risk of adverse events including but not limited to suicide, suicidal tendencies, aggressiveness, hostility and mania associated with the use of Paxil but have continuously failed to warn consumers.

...

28. The Plaintiffs purchased, acquired or paid for Paxil for minors or for themselves without knowledge of the lack of efficacy or the increased risks of suicide, suicidal tendencies, aggressiveness, hostility and mania associated with use in children and adolescents.

29. Defendants' failure to publish, disseminate or inform its consumers of the results of its clinical trials regarding the lack of efficacy and serious safety concerns of Paxil's use in children and adolescents and the Defendants' publication of limited clinical trial results which falsely implied the safety and efficacy of Paxil has misled all consumers who purchased Paxil for the treatment of children and adolescents.

...

43. GSK's studies also demonstrated a substantially increased risk of suicidal thoughts and acts. Combined, studies 329, 377 and 701 showed that certain possibly suicide related behaviours were approximately two times more likely in the Paxil group than the placebo group. The

extension phase of study 329 and study 716 provided support for the presence of such a risk in youngsters taking Paxil.

[20] These allegations are repeated in Mr. Field's affidavit. A few examples include:

10. At the time of purchase my parents and I were unaware of the dangers and risks posed by Paxil. No mention was made by any of my physicians or other care givers of the dangers and negative side effects associated with using the drug as an adolescent.

...

14. On the basis of the article attached to this my Affidavit as **Exhibit "C"**, the Health Canada advisory attached as **Exhibit "B"**, and the Canadian Medical Association Journal Article attached as **Exhibit "A"**, I believe that taking Paxil put me at increased risk of suicidal ideation and I am grateful that I chose not to make an attempt to take my own life.

...

17. While taking Paxil my anxiety worsened, I had increased negative feelings, the severity of my depression increased, I romanticized about committing suicide, I had a heightened sense of hopelessness, I lacked motivation and energy more than before I took Paxil, I engaged in self-harming behaviour such as cutting myself with scissors, which I did not do prior to taking Paxil. Most often, I did not speak to others about these feelings.

[21] Although both the statement of claim and the affidavit of Mr. Field are replete with allegations that Paxil is harmful to children and adolescents under 18 and that it increased their risks of suicide attempts or self-harm, those assertions are entirely absent from the common issues described in the statement of claim and listed in Mr. Field's affidavit. Rather, the proposed common issues are carefully confined to whether Paxil was an ineffective treatment for persons under 18 years of age and whether GSK "is liable to account to any of the class members on a restitutionary basis for any part of the proceeds of the sales of Paxil".

[22] The common issues proposed in the application for certification are not only devoid of the allegations of harm in the statement of claim, they appear to be inconsistent with Mr. Field's personal expectations and motivation as he has explained them in paragraph 5 of his affidavit:

5. The financial, emotional, physical and psychological stress that has been involved in my ordeal makes participating in the within action an important endeavour for me. It is important to me that the Defendant be held accountable.

[23] Accepting that Mr. Field (or his family) did not pay for his Paxil, and recognizing that the common issues are confined to claiming reimbursement "on a restitutionary basis" because Paxil is said to have been ineffective (rather than harmful), it appears that the common issues being put forward for certification will not enable Mr. Field to recover anything for the issues important to him. He will be confined to pursuing an individual claim. Again, these matters are relevant to whether he would be an appropriate person to fairly and adequately represent the interests of the class.

[24] Counsel for the applicant, GSK, has assured the court that the proposed cross-examination of Mr. Field is expected to take no more than half a day and that it will be conducted at any reasonable location chosen by Mr. Field and plaintiffs' counsel. Accordingly, cross-examination on his affidavit will not result in an injustice to Mr. Field.

[25] I find that a cross-examination of Mr. Field may assist the court in applying the criterion set out in ss. 6 and 6.1 of *The Class Actions Act* to the certification application. The application for leave to cross-examine him on his affidavit is granted. It will take place at such date, time and place as may be agreed upon between counsel or

as will be further ordered by the court. Any costs incurred by plaintiffs' counsel to attend may be spoken to at the certification hearing.

J.
D.P. BALL