

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Miller v. Merck Frosst Canada Ltd.*,
2013 BCSC 1652

Date: 20130906
Docket: S110437
Registry: Vancouver

Between:

Michael Miller

Plaintiff

And

**Merck Frosst Canada Ltd., Merck Frosst Canada & Co.
Merck & Co., Inc., Merck Sharpe & Dohme Corp.**

Defendants

Before: The Honourable Mr. Justice R. Punnett

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff:

D.A. Klein
N.C. Hartigan

Counsel for the Defendants:

J.M. Sullivan
R.L. Reinertson

Place and Date of Hearing:

Vancouver, B.C.
June 14, 2013

Place and Date of Judgment:

Vancouver, B.C.
September 6, 2013

[1] These reasons arise from a case management hearing held relating to reasons for judgment on the certification application which are found at 2013 BCSC 544.

Background

[2] Certification was granted subject to resolution of deficiencies in the affidavits of plaintiff counsel's staff members and a lack of sufficient information in the litigation plan respecting the expert reports.

[3] The parties disagree as to whether those issues have now been addressed and with respect to the terms of the certification order.

Law

[4] The order of a court is to express the decision of the court. (*Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267. A decision is a conclusion (Concise Oxford English Dictionary). It must be clear and unambiguous and “should not require resort to extrinsic sources ... as aids to interpretation” (*Halvorson* para. 18). It “should direct what is to be done, not the thought process that must be taken by the body to whom the matter is remitted.” (*Knapp v. Town of Faro*, 2010 YKCA 7, para. 7). To these principles I would add that as the expression of a conclusion it does not encompass an explanation for the conclusion. It cannot be vague. It must be clear so there is no issue respecting what is required for compliance.

[5] Since the order has yet to be entered the court retains the jurisdiction to consider the matters raised by counsel.

Terms of the Order

[6] The terms of the order that are in contention relate to the matters to be satisfied before certification is granted and the wording of the order relating to the allegation of deceptive practices contrary to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2.

[7] The affidavits filed by members of the plaintiff's legal firm respecting their contact with prospective class members were those of two paralegals. In my reasons I summarized their affidavits as follows:

[23] The plaintiff also filed an affidavit from Alicyn Cumming, an administrative assistant at his counsel's office, sworn on July 12, 2011. Ms. Cumming appended to her affidavit various product monographs and articles. She also swore that she had been advised by a lawyer in the plaintiff's law firm that the lawyer had been contacted by 170 Canadian men who had advised that they wished to participate in a claim for damages arising from personal injury due to the use of Propecia and/or Proscar. Thirty-nine of them are from B.C.

[24] An affidavit of Ms. Wong, a paralegal in the plaintiff counsel's firm, sworn October 14, 2011, was also filed. Ms. Wong attached searches of Health Canada's Drug Product Database and swore that the number of men in B.C. who had contacted the plaintiff's law firm had grown to 44 all except for one of whom had started taking "the drug" before February 1, 2010 (the date generic finasteride became available); 32 of the 44 reported having stopped taking the drug before that date. She does not give the source of this information nor which drug the men referred to.

[25] The second affidavit of Ms. Wong, sworn March 16, 2012, asserts 281 men in Canada of whom 55 are from B.C. had now contacted the plaintiff's counsel's law firm. Again, no source is given nor which drug is referred to.

[8] Given the information was tendered for the truth of its contents I ordered that the issue of the inadmissible hearsay be remedied.

[9] The plaintiff proposes that the order address this issue as follows:

Certification is dependent upon the Plaintiff filing an affidavit satisfactory to this Court from the paralegal who was in direct contact with prospective class members.

[10] The defendants propose the following wording:

Certification is dependent upon the Plaintiff filing affidavit(s) satisfactory to this Court from the lawyers who were contacted by prospective class members in order to address the deficiencies of the affidavits of staff members of the Plaintiff's counsel's firm, setting out the information respecting potential class members in contact with the Plaintiff's counsel's firm.

[11] Firstly, the material relied on at the certification hearing had stated that the paralegal had been advised by a lawyer. I am now advised that was in error and that it was actually another paralegal who spoke to the prospective class members hence the difference in the two drafts with plaintiff's draft referring to a paralegal as opposed to the defendant's draft referring to a lawyer. Given the point in issue arose from the hearsay nature of the evidence whether the individual was a lawyer or a paralegal is not material. What is material is that the affidavit be that of the individual who spoke to the prospective class members.

[12] The wording proposed by the defendants includes wording relating to the reasons for the order. As discussed earlier that is not appropriate. The wording proposed by the plaintiff is an accurate reflection of the order made, however it is to be amended by removing the word "lawyer" and replacing it with "individual". The wording will therefore be:

Certification is dependent upon the Plaintiff filing an affidavit satisfactory to this Court from the individual who was in direct contact with prospective class members.

[13] The next term in contention relates to the issue of the deficiencies in the litigation plan in so far as it relates to the matter of expert reports.

[14] At paras. 220 and 236 of the reasons I stated this:

[220] ... It is clear that the common issue of causation is going to turn on fulsome expert and scientific evidence. The litigation plan should provide some assurance as to how those issues will be addressed in order that the court can be satisfied that the common issues will be effectively and efficiently pursued if the action is certified (*Bellaire* at para. 53). The current statement in the plan is, as was noted in *Bellaire*, "largely a recitation of the steps that would occur in any piece of litigation" (para. 52). In *Bellaire* the judge suggested at para. 53 that where experts are going to be retained there should be an indication in the plan of how those experts are going to be identified and retained. Certification of this action is therefore subject to this deficiency in the litigation plan being remedied. In requiring this I am not assessing the merits of the claim but simply recognizing the obligation of the court to insure that the proceedings proceed efficiently.

...

[236] With respect to the litigation plan in my view the proposed plan in so far as it addresses expert reports is insufficient. I invite counsel to provide submissions on what arrangements are being made respecting expert reports and when they will be produced in order that realistic orders

can be made respecting their production.

[15] The defendants propose that the order state:

Certification is dependent upon Plaintiff's counsel filing an amended litigation plan satisfactory to this Court as it addresses expert reports, including addressing what arrangements are being made respecting expert reports, how those experts are going to be identified and retained, and when the expert reports will be produced, in order that the Court can be satisfied that common issue 1 will be effectively and efficiently pursued.

[16] The plaintiff proposes:

Certification is dependent upon Plaintiff's counsel filing submissions on what arrangements are being made respecting expert reports, how those experts are going to be identified and retained, and when the expert reports will be produced.

[17] In my view para. 236 qualifies para. 220 and the appropriate order is that proposed by the plaintiff.

[18] The final term of the order in dispute relates to the allegation of a breach of a duty to warn and the allegation that the defendants engaged in deceptive acts or practices.

[19] The plaintiff proposes that the order state:

4. The nature of the claims asserted on behalf of the Class are breach of a duty to warn with respect to the side effect of persistent sexual dysfunction and that the Defendants engaged in deceptive acts or practices, contrary to s. 4 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "Consumer Protection Act").

[20] The defendant proposes that the order state:

4. The nature of the claims asserted on behalf of the Class are breach of a duty to warn with respect to the side effects of persistent sexual dysfunction and that the Defendants engaged in deceptive acts or practices, contrary to s. 4 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "Consumer Protection Act") in failing to disclose Propecia and Proscar's product defects, namely persistent sexual side effects after discontinuation of use".

[21] The reasons at para. 97 said this:

[97] As a result I reject the submission of the defendants that they are not suppliers and that the transaction is not a consumer transaction and am satisfied that the plaintiff has a cause of action pursuant to the *BPCPA*. The amended notice of civil claim alleges that the defendants engaged in a deceptive act or practice, pursuant to s. 4, in failing to disclose Propecia and Proscar's product defects, namely persistent sexual side effects after discontinuation of use.

[22] The plaintiff submits that the defendant's inclusion of the words "in failing to disclose Propecia and Proscar's product defects, namely persistent sexual side effects after discontinuation of use" limits the plaintiff's claim while the reasons just summarized the general allegation. They note that the notice of civil claim contained a

detailed allegation of deceptive practices at paras. 43-50 as follows:

Business Practices and Consumer Protection Act

43. The defendants' solicitations, offers, advertisements, promotions, sales and supply of Propecia and Proscar for personal use by the plaintiff and by class members were "consumer transactions" within the meaning of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("BPCPA"). With respect to those transactions, the plaintiff and class members who ingested Propecia and Proscar are "consumers" and the defendants are "suppliers" within the meaning of the BPCPA.

44. The defendants' conduct in their solicitations, offers, advertisements, promotions, sales and supply of Propecia and Proscar had the capability, tendency or effect of deceiving or misleading consumers regarding the safety and efficacy of Propecia and Proscar. The defendants' conduct in its solicitations, offers, advertisements, promotions, sales and supply of Propecia and Proscar were deceptive acts and practices contrary to s.4 of the BPCPA. The defendants' deceptive acts and practices included the failure to properly disclose all material facts regarding the risks of using Propecia and Proscar.

45. In their product labeling and in their advertisements to consumers, the defendants' solicit, promote and advertise that any sexual dysfunction side effects such as decreased libido, erectile dysfunction, ejaculation disorder and decreased ejaculate volume experienced while on the medication should resolve with either continued use, or upon discontinuation of use. The Propecia Product Monograph dated October 6, 2010, for example, states "Resolution of these adverse reactions occurred in men who discontinued therapy with PROPECIA and in most who continued therapy." This claim is not true as there are many men who continue to suffer from side effects of sexual dysfunction long after discontinuing use. If the defendants had conducted proper pre-market testing, or had conducted proper post-market testing, they would have known that their products carry this serious risk.

46. The defendants have changed the warning labels for Propecia in Europe, which now state: "In addition, the following have been reported in post-marketing use: persistence of erectile dysfunction after discontinuation of treatment with PROPECIA" but have not provided this same warning to consumers in Canada. The defendants have done nothing to alert consumers to the risk of persistent side effects of sexual dysfunction. There has been no additional information placed on the product labeling nor has a "Dear Doctor" letter been sent to physicians alerting them to the post-marketing adverse events. Instead, the defendants concern is to maintain the presence of their products in the marketplace keeping consumers and their physicians in the dark about the serious risks caused by this cosmetic treatment.

47. The defendants breached the BPCPA by failing to disclose that some men may experience persistent serious side effects of sexual dysfunction and in making representations that any side effects experienced would go away after discontinuing use, when this is not true.

48. As a result of the defendants' deceptive acts and practices, the plaintiff and class members have suffered loss and damages. The plaintiff seeks injunctive relief and declaratory relief and damages and statutory compensation pursuant to ss. 171 and 172 of the BPCPA on his own behalf and on behalf of class members who purchased Propecia or Proscar in British Columbia. Such relief includes the disgorgement of the profits or revenues received by the defendants from the sale of Propecia and Proscar in British Columbia.

49. The declaratory and injunctive relief sought by the plaintiff in this case includes an order under s.172 of the BPCPA that the defendants advertise any judgment against them and that they properly inform consumers and their physicians of the risks of persistent side effects of sexual dysfunction associated with the product which includes sending a "Dear Doctor Letter" to alert

physicians to this problem.

50. It is not necessary for the plaintiff and class members to establish reliance on the defendants' deceptive acts or practices in order to establish breach of the BPCPA and a remedy for that breach. In the alternative, if reliance is required to establish statutory breach and/or remedy, such reliance may be assumed or inferred on the facts of this case. In the further alternative, there was actual reliance by the plaintiff and class members on the defendants' deceptive acts and practices.

[23] Since para. 97 of the certification reasons simply summarized the general nature of the claim it is not appropriate to incorporate that in the order. The wording proposed by the plaintiff is an accurate reflection of the order made.

[24] That addresses the issues raised respecting the terms of the order. I turn now to the information provided by the plaintiff to address the issues outstanding as a result of the certification order.

[25] The plaintiff filed a new affidavit from Lisa Porteous, the paralegal who had direct contact with the prospective members of the class. This affidavit is provided in order to remedy the hearsay defects noted earlier. The defendant objects firstly on the basis that no explanation was offered as to why an affidavit from the individual with direct contact with the prospective class members was not provided in the first place. As to that objection plaintiff's counsel explained that it was simply a matter of poor practice in which hearsay affidavits have been commonly used when, as the plaintiff concedes, they should not have been. I accept that explanation and do not see a need for the plaintiff to explain that by way of affidavit. The explanation of counsel is sufficient.

[26] The defendants also note there are inconsistencies in the affidavit compared to the earlier affidavits given the Porteous affidavit refers to direct communication with 120 men who stated they were from BC and had taken Propecia and/or Proscar with 115 of them reporting that they had reported being prescribed Propecia and/or Proscar for male pattern hair loss in BC prior to November 18, 2011 and had experienced one or more side effects of sexual dysfunction that had persisted after discontinuation of Propecia and/or Proscar. They note that the Porteous affidavit lacks a temporal timeline and is therefore incomplete.

[27] The plaintiff's counsel advises they can explain the differing numbers and explain the timeline and have offered to file a supplementary affidavit. I order that such an affidavit be filed.

[28] The final matter raised by the defendants related to the litigation plan. Initially the plaintiff sought an adjournment respecting the filing of an amended litigation plan until the fall when they anticipated to have more detailed information respecting the proposed expert evidence. However, they then filed a further proposed litigation plan which addressed the issue of experts as follows:

12.1 The Plaintiff has retained Dr. James Wright, a clinical pharmacologist, to assist in this litigation. As the action progresses, and discoveries are completed, the Plaintiff anticipates retaining additional experts including:

- 1) an epidemiologist to testify in the common issue of generic causation;

- 2) an endocrinologist to testify on the common issue of generic causation;
- 3) a medical professional with expertise in men's sexual health and reproduction to testify as to the common issues of generic causation and breach of the standard of care;
- 4) a Canadian regulatory expert to testify on the common issues related to breach of the standard of care; and
- 5) a medical professional with expertise in treating hair loss to testify on the common issues related to the standard of care.

12.2 The Parties shall exchange expert reports following completion of documentary and oral discoveries.

12.3 The plaintiffs in related U.S. litigation will be obtaining expert reports on the issue of generic causation and standard of care. The Plaintiff anticipates co-ordinating efforts with his American counterparts in this regard in an effort to share resources and expenses, particularly on the issue of generic causation. There will however be some issues which are distinct to Canada, such as those related to our regulatory system, where the Plaintiff will need to obtain experts separate from the American litigation.

[29] The plaintiff submits that these amendments satisfy the concerns raised. The defendants submit the amended litigation plan still does not address the concerns of the court and that all the plaintiff has done is name the type of experts.

[30] In my view the proposed amendments do not address the concerns raised. While the plaintiff has now named the type of experts he has not provided information respecting how they are to be identified and retained. The litigation plan therefore is not approved. The plaintiff has liberty to apply to address this issue.

[31] The plaintiff also seeks an order that the defendants file their statement of defence and begin production of their documents. In my view this request is premature, as the matters noted remain outstanding. Once the outstanding issues are dealt with the action will be fully certified. At that point the statement of defence should be filed.

“Punnett J.”