IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Stanway v. Wyeth Canada Inc.,*
2015 BCSC 983

Date: 20150610
Docket: S111075
Registry: Vancouver

Between:

Dianna Louise Stanway

Plaintiff

And

Wyeth Canada Inc., Wyeth Pharmaceuticals Inc., Wyeth Holdings Canada Inc., Wyeth Canada, Wyeth-Ayerst International Inc. and Wyeth

Defendants

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for the Plaintiff:	D. Lennox N.C. Hartigan A. Vergis
Counsel for the Defendants:	W. McNamara R. Sutton
Place and Date of Hearing:	Vancouver, B.C. April 2, 2015
Place and Date of Judgment:	Vancouver, B.C. June 10, 2015

I. INTRODUCTION

[1] The parties in this certified class proceeding seek an approval order of a settlement agreement, as well as ancillary orders, under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*].

[2] The action was certified as a class proceeding on August 4, 2011. It relates to the prescription medications, Premarin (taken in combination with a progestin), and Premplus, that the plaintiff alleged to be linked to breast cancer in women who took them for the relief of symptoms of menopause.

[3] Ms. Stanway is the representative plaintiff in the class action against the defendants, Wyeth Canada Inc., Wyeth Pharmaceuticals Inc., Wyeth Holdings Canada Inc., Wyeth Canada, Wyeth-Ayerst International Inc. and Wyeth (collectively, "Wyeth"). She alleged that she contracted ductal and lobular breast cancer as a result of consuming its products, Premarin in combination with progestin and Premplus.

[4] In her statement of claim, the plaintiff alleged that the defendants were negligent in their marketing, testing, manufacturing, labelling, distribution, promotion and sale of Premarin taken with progestin and Premplus. The plaintiff also alleged that the defendants breached the *British Columbia Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*], by engaging in solicitations, offers, advertisements and promotion of the sale and supply of Premarin taken with progestin and Premplus which had the effect of deceiving consumers regarding the efficacy and safety of hormone therapy.

[5] Ms. Stanway agrees to the proposed settlement. A small number of class members oppose it.

II. BACKGROUND

[6] This class action was commenced on July 6, 2004. As noted, Ms. Stanway became the court appointed representative plaintiff. Two other class members signed retainer agreements with Klein Lawyers, Ms. Midgley in August 2004 and

Ms. Willis in October 2007. Ms. Willis became the court appointed representative plaintiff for a subclass of non-resident class members.

History of Proceedings

[7] Over the past ten years, there have been 24 different court appearances totaling 31 days of court time. There are 14 reported decisions, as well as various unreported decisions. I highlight the most relevant.

[8] The American defendants filed a motion on June 29, 2005 challenging jurisdiction. As a result, an Access and Confidentiality Order was negotiated and obtained on May 24, 2006, allowing Ms. Stanway access to an immense amount of work product of the plaintiffs in a parallel American class action suit. The defendants' jurisdiction motion was heard in September 2007 and dismissed on June 27, 2008. An appeal heard by our Court of Appeal in May 2009 was dismissed on December 21, 2009, and leave to appeal to the Supreme Court of Canada was denied on May 27, 2010.

[9] A number of preliminary motions followed the delivery of the plaintiff's certification record on February 18, 2010.

[10] Class certification was granted on August 4, 2011 and upheld on appeal on June 15, 2012.

[11] The class definition approved by the court was as follows:

> Women who were prescribed Premplus, or Premarin in combination with progestin during the Class Period and ingested Premplus, or Premarin in combination with progestin and were thereafter diagnosed with breast cancer.
>
> The "Class Period" runs from January 1, 1977 until December 1, 2003, inclusive.

[12] The court approved the manner and form of the notice of class certification in October 2012; however, publication of the notice was delayed until April 2014 by agreement of the parties with the deadline for opting in as August 25, 2014. The

settlement agreement extends this deadline to October 10, 2014. Over 1100 individuals delivered opt-in requests prior to October 10, 2014.

[13] Various case conferences were held between October 2011 and June 2012, during which time a demand for particulars was made by the defendants, the plaintiff's list of documents was amended multiple times and a notice to admit was delivered by the plaintiff. On July 3, 2012, the Canadian defendants started producing documents and ultimately delivered 17,676 documents to add to the 500,000 documents produced by the American plaintiffs.

[14] Oral discoveries of four representatives of the defendants took place between November 2012 and September 2013. One such representative refused to answer questions on examination and the plaintiff brought a motion to compel answers. The plaintiff was successful and the defendants were denied leave to appeal the court's decision of March 7, 2013.

[15] A consent order creating a Quebec subclass was issued on December 6, 2012 in response to a competing class action issued in Quebec six days after certification of this action. Four hundred Quebec residents have opted into this action and plaintiff's counsel has assigned a bilingual lawyer and bilingual paralegal to this case, has retained a Quebec firm to assist with Quebec legal issues and has retained a leading expert on Quebec civil law and the duties of manufacturers to testify at trial in order to advance the rights of their Quebec clients.

[16] In all, the plaintiff hired ten expert witnesses for the purposes of trial, including scientists, professors, medical doctors, a regulatory consultant and a pharmaceutical senior executive. The defendants delivered 12 expert reports for trial. The expert witnesses, along with fact witnesses and read-in discovery testimony of defence representatives, total 35 witnesses expected to testify at trial.

[17] The parties were working on a joint electronic book of exhibits at the time the settlement was reached. The assessment of plaintiff's counsel is that the total number of exhibits at trial would likely have exceeded 2,000.

Settlement Negotiations

[18] No settlement negotiations took place during the first eight years of litigation between the parties.

[19] On August 7, 2012, the plaintiff served a notice to mediate on the defendants. The parties agreed on a mediator and dates; however the mediator died before the scheduled mediation in January 2013. Gary Fitzpatrick was appointed as mediator by the Mediate BC Society.

[20] Mr. Fitzpatrick held two days of mediation in April 2013 followed by another two days in June 2013. No settlement was reached between the parties. No further mediation talks were held for the next sixteen months. Mr. Fitzpatrick continued his communication with the parties.

[21] On October 8 and 9, 2014, the parties met with Mr. Fitzpatrick for further mediation. An agreement in principle was confirmed on October 11, 2014.

[22] Notice of the proposed settlement was provided to class members by direct mail and email, by publication in B.C. newspapers and by posting a copy of the settlement agreement on the website of plaintiff's counsel.

Settlement Terms

[23] The essential terms of the proposed settlement agreement are that the defendants will pay a lump sum of $13.65 million with no reversionary rights and, in exchange, they will receive a release from class members and public health insurers.

[24] A detailed distribution protocol is provided in Schedule B of the proposed agreement setting out the procedures for determining each class member's eligibility for and proportionate share of compensation. In essence, claimants must submit a claim with supporting medical documentation to the claims administrator within one year of the date of settlement approval. The claims administrator will review the claims and decide which are eligible. Compensation will be allocated based on a

points system according to the relative strength of the claims and severity of the injuries. Monies will be paid to successful claimants' public health insurers based on direct and subrogated claims. A claimant may appeal the decision of the claims administrator regarding whether they are a member of the class, whether they meet the threshold eligibility criteria and whether to award points to the claimant and, if so, how many.

[25] Under the proposed settlement agreement, claimants do not receive separate payments for economic loss, nor do claimants or their families receive separate payments for derivative claims. However, estate claims are treated equally with those of living claimants provided the claimant was alive within two years of the commencement of the action.

Financial Arrangements

[26] Ms. Stanway, Ms. Midgley and Ms. Willis each signed a retainer agreement with class counsel for a contingency fee of 33.33%, plus taxes, disbursements and interest on the disbursements of 10% per annum, not compounded.

[27] As a result of the settlement terms, the contingency fee is $4,550,000 plus taxes for a total of $5,096,000. Total disbursements, including tax and interest, are $813,263.72. These fees and disbursements include $514,235.45 which class counsel is obligated to pay four Canadian law firms who acted as agents and a group of 34 American law firms who assisted as consultants in this case. Class counsel has chosen to include this amount in their fees, rather than treat them as separate disbursements.

III. ANALYSIS

A. Is the settlement agreement fair and reasonable and in the best interests of the class as a whole?

[28] Section 35 of the *CPA* states:

> **35** (1) A class proceeding may be settled, discontinued or abandoned only
>
> (a) with the approval of the court, and

> (b) on the terms the court considers appropriate.
>
> (2) A settlement may be concluded in relation to the common issues affecting a subclass only
>
> (a) with the approval of the court, and
>
> (b) on the terms the court considers appropriate.
>
> (3) A settlement under this section is not binding unless approved by the court.
>
> (4) A settlement of a class proceeding or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class proceeding, but only to the extent provided by the court.
>
> (5) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment, the court must consider whether notice should be given under section 20 and whether the notice should include
>
> (a) an account of the conduct of the proceeding,
>
> (b) a statement of the result of the proceeding, and
>
> (c) a description of any plan for distributing any settlement funds.

[29] The test for approving a class action settlement is whether it is fair, reasonable and in the best interests of the class as a whole. This is to ensure the rights of absent class members are protected, given they are not a party to the agreement.

[30] Madam Justice Dickson explained the court's approach in *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145 at paras. 17 - 21:

> [17] The standard for approval of a settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interest of the class as a whole. The court need not dissect the proposed settlement with an eye to perfection. Rather, the settlement must fall within a range or zone of reasonableness to be approved: [citations omitted].
>
> [18] The court must consider the risks and benefits associated with continuing the litigation in deciding whether to approve the settlement. The question for determination is whether there are any disadvantages to the settlement that justify its rejection: [citations omitted].
>
> [19] The court is not entitled to modify the terms of a negotiated settlement. Its power is limited to approving or disapproving the settlement reached by the parties: [citations omitted].
>
> [20] The recommendation and experience of counsel are significant factors for consideration on an approval application. There is a presumption of fairness when a proposed settlement is negotiated at arm's length by class counsel and presented to the court for approval: [citations omitted].

> [21] The court may take into account evidence of expected participation in the settlement by class members when determining the sufficiency of available settlement funds: [citation omitted].

[31] The courts have considered various factors in determining whether a settlement should be approved by the court. I described these factors in *Cardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612 at para. 17 as:

1. the likelihood of recovery, or the likelihood of success;
2. the amount and nature of discovery evidence;
3. settlement terms and conditions;
4. recommendations and experience of counsel;
5. future expense and likely duration of litigation;
6. recommendations of neutral parties, if any;
7. number of objectors and nature of objections;
8. presence of good faith and absence of collusion;
9. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation;
10. information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.

[32] As I indicated at para. 18 of *Cardozo*, some of these factors may be attributed greater significance while others may be disregarded or amalgamated depending on the nature of the facts in each case.

[33] I will consider each of the relevant factors in this case.

The likelihood of recovery or success

[34] It is evident from the number of expert witnesses and the amount of discovery and exhibits that there are many complex issues in this case. Success is not guaranteed, even though class counsel believes they would have won at the common issues trial.

[35] Even upon success, however, immediate financial recovery would not result for the class members. Potential appeals could take a few years to resolve following which each of the 1100 individuals would need to prove causation in her specific

circumstances. Not only could this take significant time to resolve (class counsel posits if one individual trial could be completed every two weeks, it could take up to 40 years to complete them all), it may prove to be too large a hurdle for some of the class members to prove their individual claims. Settlement of subsequent cases could potentially occur after a certain number of individual trials; however, class counsel's understanding of hormone replacement therapy litigation in the United States suggests that numerous verdicts would be needed before settlement would even be considered.

The amount and nature of discovery evidence

[36] There is a great deal of disclosure in this case both from the Canadian defendants and American plaintiffs. Class counsel says that as a result they had a full appreciation of the strengths and weaknesses of the case when negotiating the settlement.

The settlement terms and conditions

[37] Class counsel asserts this settlement is comparable to other class action settlements involving medical products. The details are provided above. Essentially, the defendants will pay a lump sum of $13.65 million in exchange for a release. A class administrator will receive medical evidence from the class members and will decide on entitlement and proportionate share of compensation using criteria consistent with the plaintiff's filed expert evidence.

[38] The proposed settlement amount may be less than expected by individual class members considering the pain and suffering endured by each and the total number of class members, however, what must be determined are if it fits within a range of reasonableness in light of all of the factors to be considered.

Recommendations and experience of counsel

[39] Mr. Klein of Klein Lawyers has over 20 years of experience in the field of class action litigation and has appeared as plaintiffs' counsel in over 25 certified

class actions in six provinces. He has written and presented extensively on the topic and has a particular interest in medical products litigation.

[40] Counsel recommends this settlement.

Future expense and likely duration of litigation

[41] While recognizing the difficulty of predicting how long litigation could last, class counsel states: “it is foreseeable that the case could last another decade or more.” Considering the alleged wrongdoing predates December 2003 and the average age of the class members is 71, this factor strongly favours settlement approval.

Recommendations of neutral parties, if any

[42] Class counsel points to the involvement of a highly experienced mediator in the negotiations of this settlement agreement. I do not, understandably, have any evidence from Mr. Fitzpatrick that he believes the agreement is fair and reasonable to the many class members or that he recommends it. I recognize some mediators address the substance of the issues and some do not. Since I have no evidence regarding Mr. Fitzpatrick’s model of mediation, I do not put much weight on this factor.

Number of objectors and nature of objections

[43] Class counsel did receive responses after they posted the notice of settlement approval hearing and proposed settlement agreement on their website. Some comments were positive and some undecided. About a dozen class members were dissatisfied with the settlement and object to this approval. One such objector appeared before the court.

[44] While some of the objectors take issue with eligibility thresholds and aspects of the points system, the primary objection is that the proposed settlement amount is inadequate compensation to the class members and does not account for individual economic loss.

[45] While the stories of individuals and their families who have suffered from breast cancer are compelling, as a matter of law I must decide whether the proposed settlement agreement is fair and reasonable and in the best interests of the class as a whole, not whether it is the best possible settlement for an individual class member.

Presence of good faith and absence of collusion

[46] This was a vigorously contested action which only settled on the brink of trial with the assistance of a very determined mediator. There is no evidence at all of collusive bargaining in this case.

Degree and nature of communications by counsel and the representative plaintiffs with class members during litigation

[47] Ms. Stanway, Ms. Willis and Ms. Midgley all deposed of their involvement in the litigation, attending court and mediation and being informed by counsel throughout. More recent class members were kept informed through notice of certification and notice of fairness hearing.

Information conveying to the court the dynamics of and the positions taken by the parties during the negotiation

[48] Class counsel points to the filed copies of all expert reports exchanged by the parties as a reasonable indication to the court of the parties' respective positions as they entered settlement negotiations.

Conclusion

[49] Upon hearing the submissions of the parties and after consideration of the above factors, I approved the proposed settlement agreement. I find it is fair and reasonable and in the best interests of the class members as a whole, particularly in light of the risks and costs inherent in pursing the litigation to completion and the age of the class members.

B. Are the fees of plaintiff's counsel fair and reasonable?

[50] Section 38 of the *CPA* requires approval for class counsel fees, stating in part:

> (1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff must be in writing and must
>
> > (a) state the terms under which fees and disbursements are to be paid,
> >
> > (b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding, and
> >
> > (c) state the method by which payment is to be made, whether by lump sum or otherwise.
>
> (2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor.
>
> …
>
> (6) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.
>
> (7) If an agreement is not approved by the court or if the amount owing to a solicitor under an approved agreement is in dispute, the court may
>
> > (a) determine the amount owing to the solicitor in respect of fees and disbursements,
> >
> > (b) direct an inquiry, assessment or accounting under the Supreme Court Civil Rules to determine the amount owing,
> >
> > (c) direct that the amount owing be determined in any other manner, or
> >
> > (d) make any other or further order it considers appropriate.

[51] I stated in *Cordoza* at para. 24 that the purpose of the approval by the court is to ensure the fee charged to the class is fair and reasonable while also ensuring the class counsel is appropriately compensated since class action litigation can be challenging and risky. At para. 25, I explained:

> [25] In assessing the reasonableness of fees, courts have examined various factors (see *Fischer v. Delgratia Mining Corp.,* [1999] B.C.J. No.3149 (Q.L.) at para. 22). These include:
>
> > 1. the results achieved;
> >
> > 2. the risks undertaken;
> >
> > 3. the time expended;

4. the complexity of the matter;
5. the degree of responsibility assumed by counsel;
6. the importance of the matter to the client;
7. the quality and skill of counsel;
8. the ability of the class to pay;
9. the client and the class' expectation; and
10. fees in similar cases.

[52] The class counsel fees in this case have been calculated as $4,550,000 plus taxes for a total of $5,096,000, based on a contingency fee of 33.33%. Total disbursements, including taxes and interest, are $813,263.72. Fees and disbursements constitute roughly 43% of the total settlement fund. In applying the above factors to class counsel's fees, I am satisfied it is fair and reasonable.

[53] Mr. Justice Cullen's comments in *White v. Attorney General of Canada*, 2006 BCSC 561 at para. 31 regarding a 30% contingency fee are apposite:

> [31] In the circumstances, counsel, in taking on the case involving a significant commitment of time and the ongoing payment of disbursements incurred a significant risk to their own economic interests, which if not adequately compensated for, would discourage similar willingness in the bar to take on difficult cases on such a basis in the future. In such circumstances, there is clearly the expectation of a higher fee than in a non-contingency fee basis.

[54] There have been considerable risks for class counsel as they have pursued this litigation to completion on their own, rather than with a consortium of counsel from various provinces. They worked on the case for ten years and the 22 expert affidavits point to the complexity of the issues. Furthermore, class counsel points out that for complex personal injury lawsuits in B.C., a fee of up to 40% is permissible under the *Law Society Rules*, Rule 8-2.

[55] On the basis of the parties' submissions and a consideration of the above factors, I approve of the proposed class counsel fee.

IV. CONCLUSION

[56] I approve the proposed settlement agreement, as well as the proposed class counsel fee.

[57] I approve the publication of the notice of settlement and appoint Deloitte as claims administrator.

“Gropper J.”