IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Logan v. Dermatech, Intradermal Distribution Inc.,* 2011 BCSC 1097

Date: 20110811
Docket: S090937
Registry: Vancouver

Between:

Sharon Lynn Logan

Plaintiff

And

Dermatech, Intradermal Distribution Inc. and Vivier Pharma Inc.

Defendants

And

Dr. Harlow Hollis

Third Party

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Corrected Judgment: The text of the judgment has been corrected on the front page of the style of cause adding additional counsel for the Plaintiff on August 16, 2011.

Counsel for the Plaintiff:	David M. Rosenberg, Q.C., David Klein and Graham Kosakoski
Counsel for the Defendants Intradermal Distribution Inc. and Vivier Pharma Inc.:	John A. Vamplew
Counsel for the Third Party:	Cameron B. Elder
Place and Date of Hearing:	Vancouver, B.C. July 19 and 20, 2011
Place and Date of Judgment:	Vancouver, B.C. August 11, 2011

[1] The plaintiff Sharon Lynn Logan applies to certify this action as a class proceeding under the *Class Proceedings Act,* RSBC 1996 c. 50 [the "*CPA*"] on her own behalf and on behalf of all persons who were injected with a product called Dermalive in Canada and who thereafter developed granulomas in the areas injected with Dermalive.

[2] In her notice of application Ms. Logan seeks the following relief:

1. certifying this action as a class proceeding;
2. defining the class as:

   "All persons who were injected with Dermalive in Canada and who thereafter developed granulomas in the area injected with Dermalive."
3. appointing Sharon Logan as the Representative Plaintiff for this class;
4. certifying the following issues as common issues:

   (1) Does Dermalive cause granulomas at a rate that materially exceeds 0.12%?

   (2) Is Dermalive unfit for its intended purpose?

   (3) Did any of the Defendants fail to warn class members and/or Health Canada of the true risk of developing granulomas from using Dermalive?

   (4) Did any of the Defendants breach a duty of care to class members and if so, when and how?

   (5) Does the conduct of any of the Defendants warrant an award of punitive damages, and if so, what amount of punitive damages should be awarded?

   (6) Did the Defendants' solicitations, offers, advertisements, promotions, sales and supply of Derrnalive for personal use by class members fall within the meaning of "consumer transactions" the *Business Practices and Consumer Protection Act* ("*BPCPA*")?

   (7) With respect to the sales in British Columbia of Dermalive to class members for their personal use, are any of the Defendants "suppliers" as defined in the *BPCPA?*

   (8) Are the class members "consumers" as defined by the *BPCPA*?

   (9) Did any of the Defendants engage in conduct that was deceptive acts or practices contrary to the *BPCPA* as alleged in the Amended Statement of Claim?

   (10) If the Court finds that the Defendants' conduct was contrary to the *BPCPA* should a monetary award be made in favour of the class and, if so, in what amount?;

[3] Dermalive is a product which is designed to be injected into patients to reduce wrinkles and other cosmetic characteristics associated with aging. It was originally developed and tested by the defendant Dermatech. In the amended notice of civil claim, Ms. Logan alleges that Dermalive was manufactured, marketed and distributed and sold in Canada by the defendants. 10,902 syringes of Dermalive were distributed in Canada between the period 2003 and 2007. In 2007 sales of Dermalive ceased in Canada.

[4] In her affidavit filed in support of this application Ms. Logan deposes that on May 18, 2006 the third party Dr. Harlow Hollis injected Dermalive into her nasolabial areas, lip line, lip roll edges and marionette puppet area. She states that five or six months after being injected with Dermalive she developed lumps on her face. Ms. Logan says that her condition became progressively worse and areas of her face became ropy and indurated. Her symptoms included red bumps or granulomas in her facial area.

[5] Ms. Logan states that between January and July 2007, Dr. Hollis treated her for granulomas. She states that the injections that he gave her were very painful. Unfortunately, the treatments were ineffective and what she describes as the unsightly bumps on her face got bigger and worse. She alleges that she has permanent disfigurement on her face as a result of the granulomas. Both in her affidavit and amended notice of civil claim she asserts that the problems described above resulted from her being injected with Dermalive.

[6] Ms. Logan also states that she was not warned about the true risks associated with the use of Dermalive. On this application she filed medical evidence to the effect that there was a significant statistical risk of adverse side effects from using Dermalive. According to one study, about 5.5% of patients who were injected with Dermalive developing symptoms similar to those experienced by Ms. Logan.

[7] Ms. Logan’s case is that Dermalive was inherently defective in that there was an unacceptably high risk of developing the side effects that she experienced after its use. She also alleges that the defendants provided substantially misleading

information about the risks associated with the use of Dermalive. Her position is that that misleading information vitiated any consent given by class members to the injection of Dermalive.

[8] Ms. Logan alleges that the defendants were negligent in failing to warn her and Health Canada of the known risks and dangers associated with the use of Dermalive. She further alleges that the defendants were negligent in manufacturing, marketing and selling Dermalive in Canada.

[9] In paragraph 24 of the amended notice of civil claim Ms. Logan alleges that the defendants jointly and severally owed a duty of care to her to ensure that Dermalive was safe for its intended use. Particulars of the defendants' negligence in failing to meet that duty of care are alleged to include:

> a) a failure to disclose and warn the plaintiff and class members that Dermalive had potentially serious adverse effects;
>
> b) marketing Dermalive in such a way as to give the plaintiff and class members no reason to suspect that Dermalive had potentially harmful and serious effects;
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> c) marketing Dermalive when it was unreasonable in all of the circumstances for it to have done so; and
>
> d) failing to recall Dermalive as soon as possible.

[10] In paragraph 25 of the amended notice of civil claim Ms. Logan alleges that the actions of the defendants in marketing and supplying Dermalive constituted consumer transactions within the meaning of the *Business Practices and Consumer Protection Act*, S.B.C., 2004 c. 2. [the "*BPCPA"*]. The plaintiff alleges that she and other potential class members who purchased Dermalive for personal use are consumers and that the defendants are suppliers within the meaning of the *BPCPA.*

[11] In paragraph 26 of the amended notice of civil claim Ms. Logan alleges that the manner in which the defendants promoted and advertised Dermalive had the ability and tendency or effect of deceiving or misleading consumers regarding the safety and contents of Dermalive and that the defendants' practices were deceptive acts and practices contrary to s. 4 of the *BPCPA.*

[12] Paragraph 28 of the amended notice of civil claim alleges that the defendants' negligence and deceptive practices have caused the plaintiff and class members to suffer loss and damage, that such loss and damage was foreseeable by the defendants and that the loss and damage was caused or materially contributed to by the acts of the defendants.

[13] Ms. Logan also alleges that the defendants' conduct was reprehensible, showed a reckless disregard for the well-being of the plaintiff and members of the potential class and was arrogant and offended the ordinary community standards of moral and decent conduct. The plaintiff accordingly seeks punitive and aggravated damages in this case.

[14] The defendant Dermatech took no part in this application. It is a French corporation and was ordered to be liquidated by the commercial court of Paris. The theory of the case set out in the amended notice of civil claim is that the three named defendants engaged in a joint enterprise or joint venture to promote and sell Dermalive in Canada and accordingly all defendants are jointly and severally liable for the wrongful acts of the others in so far as they affect members of the class.

[15] The law applicable to applications to certify proceedings pursuant to the *CPA* is well settled. The starting point for a consideration of whether certification is appropriate is of course the C*PA.* Sections 4 and 5 provide as follows:

> **4** (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
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> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class of 2 or more persons;
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> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
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> (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, an interest that is in conflict with the interests of other class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Certification application

5 (1) An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.

(2) A copy of the notice of application and supporting affidavit must be filed and

(a) served by ordinary service on all persons by whom or on whose behalf a pleading has been filed in the proceeding, and

(b) served by personal service on any other persons named in the style of proceedings.

(3) Unless otherwise ordered, there must be at least 14 days between

(a) the service of a notice of application and supporting affidavit, and

(b) the day named in the notice of application for the hearing.

(4) Unless otherwise ordered, a person to whom a notice of application and affidavit is served under this section must, not less than 5 days or such other period as the court may order before the date of the hearing of the application, file an affidavit and serve a copy of the filed affidavit by ordinary service on all persons by whom or on whose behalf a pleading has been filed in the proceeding.

(5) A person filing an affidavit under subsection (2) or (4) must

(a) set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,

> (b) swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and
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> (c) provide the person's best information on the number of members in the proposed class.
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> (6) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.
>
> (7) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.

[16] Section 4 contains mandatory language requiring the court to certify a proceeding if the five conditions set out in the section are present. The onus is of course on the applicant to establish that the requisite conditions are present.

[17] In this case the defendants have raised a number of specific arguments that they submit make this case unsuitable for a class proceeding. I will deal with those arguments later in these reasons. However, I think the principal point relied on by the defendants is that it cannot be said that the common issues predominate over those affecting individual class members and that therefore a decision on the proposed common issues would not substantially advance a resolution of the claims of class members. The defendants' position is that a class action would be less efficient than individual actions by class members.

[18] The class action jurisprudence establishes that there are fundamental policy and procedural considerations that should inform a judge in determining whether to certify an action as a class proceeding.

[19] The policy considerations are set out in the Supreme Court of Canada decision in *Western Canada Shopping Centres Inc. v. Dutton* 2001 SCC 46. I agree with plaintiff's counsel's submission that that case identified the three goals of class proceeding legislation as being the promotion of access to justice, judicial economy and behaviour modification.

[20] The important procedural consideration is that the question on a certification application is what procedure is most appropriate to move the litigation forward to further the objects of access to justice and judicial economy.

[21] In a case involving an allegedly dangerous medical device or procedure, the threshold questions that usually arise are the inherent risks involved in the use of the device or procedure and whether the risks were adequately disclosed to the public. A determination of these issues will not establish that any individual class member is entitled to relief, although it may determine definitively that they are not. At the certification stage, however the issue is whether it is more in keeping with the purpose of class proceeding legislation to determine those threshold questions collectively or through a series of individual actions. That is the essential point made by the Court of Appeal in *Harrington v. Dow Corning Corp.,* 2000 BCCA 605.

[22] With these considerations in mind I turn to the statutory conditions set out in the *CPA.*

Do the Pleadings Disclose a Cause of Action

[23] The amended notice of civil claim does disclose causes of action in negligence and a statutory cause of action pursuant to the *BPCPA*. It alleges that the defendants were jointly responsible for the fabrication, distribution and sale of Dermalive in Canada and that the defendants continued to make, distribute and market Dermalive in Canada despite the discovery that its use had serious adverse side effects.

[24] However, the defendants submit that the amended notice of civil claim is defective in at least two respects and that it therefore fails to meet the low threshold for alleging a cause of action set out in *Hunt v. Carey Canada Inc.* [1990] 2 S.C.R. 959. The two defects relied upon are that the action was commenced after the expiration of the limitation period and that there is no allegation that Vivier or Intradermal was a manufacturer of Dermalive as that term is defined in the *Medical Devices Regulation*, SOR 98-282 (the "*Regulation"*).

[25] I see no merit in either submission. In this case it is not plain and obvious that Ms. Logan's claim is barred by the expiration of any limitation period. She began to have treatments for her granulomas only in January 2007. It is impossible

to determine when she had the requisite knowledge for the limitation period to commence to run against her, as set out in s. 6(4) and (5) of the *Limitation Act*, R.S.B.C. 1996 c. 266. It is however not plain and obvious that her claim is statute barred.

[26] The amended notice of civil claim does allege that all three defendants acted jointly in the manufacture and distribution of Dermalive. In addition there is a specific allegation that Vivier produced Dermalive in Canada for Dermatech. As it is not plain and obvious that these allegations are bound to fail, there is no basis for concluding that there has been no cause of action alleged against Vivier and Intradermal pursuant to the *Regulation.*

Is there an Identifiable Class

[27] The proposed class is "All persons who were injected with Dermalive in Canada and who thereafter developed granulomas in the area(s) injected with Dermalive". On the face of it this would appear to set out a clearly identifiable class. However the defendants make two somewhat inconsistent objections to the definition. They say that the class is too broad. They also say that the class size is insufficient.

[28] The assertion that the class definition is too broad is based on the absence of any temporal limits on class membership. The defendants say that without some temporal limits the class will clearly include many members whose claims are barred by the expiration of an applicable limitation period. They point out that Dermalive was licensed in Canada on July 11, 2003 but this action was not commenced until February 2009, so there are probably persons within the class as defined whose claims are barred.

[29] I do not agree with this objection to the class definition. In my view a temporal limitation contained in the class definition would prejudge what is an individual issue, that is, when the limitation period for each individual class member began to run. In so doing it may exclude persons who have legitimate claims from

participating in the class action. I think that that danger is particularly present in this action, given that the running of a limitation period does not commence until a reasonably informed class member would have had sufficient information to conclude that she had a basis to commence an action. Given this consideration it seems to me impossible to place any workable temporal limits on the class definition.

[30] I am also of the view that it is premature to conclude that the class size is insufficient. The evidence is that just under 11,000 syringes of Dermalive were distributed in Canada while it was available. There was evidence before me of one study that suggested that 5.5% of users of Dermalive developed complications. Anecdotal evidence from Dr. Hollis indicated that 4 out of the150 patients his office injected with Dermalive developed granulomas. In addition, there has been no notice published inviting class members to enrol in the class action. At a minimum therefore, this objection is premature. It also seems to me that the complex questions of the extent to which Dermalive causes granulomas and the extent of what the defendants ought to have known about the risks of its use would make a class proceeding a preferable procedure even with a relatively small class.

[31] I am therefore satisfied that there is a sufficiently large identifiable class to warrant certification.

Do the Claims of Class Members Raise Common Issues

[32] I agree with Ms. Logan's submissions that the proposed common issues raise what have been called generic issues of causation. I take that phrase to mean preliminary underlying issues that must be proved in the chain of causation necessary to establish the claims of class members. A common issue need not be determinative of liability as long its resolution will be of material assistance in resolving the claims of class members.

[33] The defendants argue that an issue cannot be a common issue unless it is a substantial common ingredient of each class members claim. However, I think that

this argument overlooks the ability of the court to constitute subclasses that have within them common issues not shared by all members of the class. It is obvious that there will have to be subclasses for those members who reside in and those members who do not reside in British Columbia for purposes of determining the *BPCPA* issues. The establishment of such subclasses is sufficient to address the objections made to the proposed common issues relating to that statute.

[34] The defendants object to the inclusion of common issue 4(2), set out in paragraph 2 of these reasons, on the grounds that it will inherently require an inquiry into the particular circumstances of each claimant. I do not agree. It seems to me that the question of whether Dermalive was unfit for its intended use does not depend on the particular circumstances of any individual claimant. It is a question that requires an examination of the properties and consequences of its intended use over the whole spectrum of its intended users. A constituent element of that question presumably will be whether the benefits of its use outweigh the risks of any adverse side effects. All of these questions are generic and therefore common issues.

[35] I think that the same analysis applies to the objection raised to proposed issue 4(4), breach a duty of care. That issue is of course not raised in a vacuum, but in the circumstances that gave rise to this litigation. Those circumstances include the fact that this is essentially a product liability case. The question of whether there has been a breach of a duty of care essentially requires analysis at a general as opposed to specific level.

[36] It may well be that some modification or refinement of some of the common issues is appropriate. However any application in that regard can be made at a case planning conference as the litigation proceeds. At this stage with one qualification I am satisfied that all of the proposed common issues are suitable for certification.

[37] The qualification to my general conclusion on common issues arises from the inclusion of the claims for punitive damages and damages pursuant to the *BPCPA* in favour of class members. It seems to me problematic to award damages to any

person whose claim is statute barred. This specific issue was not argued before me. Rather than delay the issuance of these reasons to permit further submissions on this point, I think it appropriate to order that proposed common issues 4(5) and 4(10) be modified to restrict any award of damages to those class members whose claims are not otherwise statute barred. I do however grant leave to the parties to address this question further at the case planning conference referred to in paragraph 48 of these reasons.

Is a Class Proceeding the Preferable Procedure

[38] Section 4(2) of the *CPA* directs that a court consider all relevant matters including those set out in ss. (a) to (e) of s. 4(2) in deciding whether a class proceeding is the preferable procedure. While this is of course a critical issue in deciding whether a proceeding should be certified I do not think it requires extensive comment in this case.

[39] As I have already indicated, this is a product liability case involving a medical device with allegedly injurious side effects. In such cases, it is the common issues of the inherent characteristics of the medical device and its consequences in common use that will usually predominate. These issues certainly tend to be the most complex and expensive to litigate. They are also of course issues that must be established in every successful claim.

[40] The defendants argue that the resolution of the common issues will not move the litigation forward in any significant way. However, there is no suggestion in their submissions that they concede in any way that any of the allegations made with respect to the inherent (or generic) properties of Dermalive are correct. Therefore, unless those issues can be determined for all class members in a class proceeding, they will have to be relitigated by each claimant. It seems to me that the cost of litigating that issue in each individual case will far outweigh the cost of determining the causation issues specific to each claimant.

[41] I also agree with Ms. Logan's counsel that the vast majority of the jurisprudence suggests that product liability claims raising issues of the inherent characteristics of a widely distributed product are especially well suited for class proceedings.

[42] In his submissions on this question counsel for the defendants placed particular emphasis on the complexities in this case arising out of the involvement of the individual physicians who administered Dermalive to class claimants. Counsel referred to the danger of this case becoming a monster of complexity in which the common issues will be overwhelmed by the individual issues of whether Dermalive was appropriately prescribed and administered in each case.

[43] However it seems to me that this argument does not stand up to close analysis. The argument confuses the two stages of a class proceeding; the determination of the common issues and the establishment of individual entitlement by each member. The complexities relied upon by the defendants will arise at the second stage, should the defendants not be successful on the common issues. There seems to me to be little danger that those complexities will overwhelm the determination of the common issues. On the other hand I think that there is a considerable risk that the costs of determining the common issues will preclude many litigants from pursuing their claims if this action is not certified. In addition, questions of physician error cannot be segregated from questions of the inherent nature of the device being applied. A common determination of the generic issues proposed will be of great assistance in determining the individual claims.

[44] Accordingly I conclude that a class proceeding is the preferable procedure for determining the proposed common issues.

Is Ms. Logan a Proper Representative Plaintiff

[45] The defendants submit that Ms. Logan is not a proper representative plaintiff. Their first submission is that Ms. Logan has not provided an adequate explanation as to why she has not pursued Dermatech. However I am satisfied that there is

sufficient evidence before me to allow me to conclude that there would be no utility in pursuing Dermatech in this proceeding. The evidence is that Dermatech has been ordered liquidated by a French tribunal having jurisdiction over it. The criticisms made about the plaintiff's investigation into the status of Dermatech seem to me to be more theoretical and technical than practical. In addition, it seems to me that the defendants are much better placed to have knowledge of these factors and make a decision as to whether to make a third party claim against Dermatech if they see any practical benefit in so doing.

[46] Finally, the defendants criticize the litigation plan proposed by Ms. Logan. They point out that the plan makes no provision for the examination of individual class members on what they characterize as the overlapping factual matrix of the issue of reliance.

[47] I think that there are two reasons why this submission is misplaced. The first is that all parties agree that the proposed litigation plan will require some refinement. It is my intention to order that the parties be given the opportunity to make submissions as to changes or improvements to the litigation after certification at a further case planning conference. The second reason is that the question of reliance is not a common issue. In my view it will arise at the stage of the determination of individual claims if it is decided that there was a failure to discharge a duty to warn by the defendants.

[48] Accordingly I am satisfied that this case should be certified. The common issues will initially be those set submitted by Ms. Logan as modified in these reasons. The parties have leave to arrange a case planning conference to make further submissions with respect to the proposed litigation plan, and refinements to the common issues. While I consider the proposed plan to be workable, it may well be that it can be improved.

"The Honourable Mr. Justice Sewell"