COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Stanway v. Wyeth Canada Inc.,*
2013 BCCA 256

Date: 20130529
Docket: CA040781

Between:

Dianna Louise Stanway

Respondent
(Plaintiff)

And

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

Appellants
(Defendants)

Before: The Honourable Madam Justice Prowse
(In Chambers)

On Appeal from the Supreme Court of British Columbia, March 7, 2013,
(*Stanway v. Wyeth Canada Inc.*, 2013 BCSC 369,
Vancouver Docket Number S111075)

Counsel for the Appellant:	W. McNamara C. Cummings
Counsel for the Respondents:	D. Klein N.C. Hartigan
Place and Date of Hearing:	Vancouver, British Columbia May 23, 2013
Place and Date of Judgment:	Vancouver, British Columbia May 29, 2013

Written Reasons by:
The Honourable Madam Justice Prowse

Reasons for Judgment of the Honourable Madam Justice Prowse:

[1] Wyeth Canada Inc., et al., the defendants in this class proceeding (the "applicants"), are applying for leave to appeal the decision of Madam Justice Gropper, made March 7, 2013, requiring the representative of the applicants to attend and answer certain questions on discovery that she had previously refused to answer, on the advice of counsel.

[2] By way of brief introduction, this action, which was certified as a class proceeding on August 4, 2011, relates to the prescription medications, Premarin (taken in combination with a progestin), and Premplus, which are alleged to be linked to breast cancer in women who took them for the relief of symptoms of menopause. I do not find it necessary to elaborate on the background in determining whether leave to appeal should be granted.

[3] The parties are agreed that the factors to be considered in determining whether leave to appeal should be granted are:

(1) whether the appeal is *prima facie* meritorious;

(2) whether the point on appeal is of significance to the practice;

(3) whether the point raised is of significance to the action itself; and

(4) whether the appeal will unduly hinder the progress of the action.

[4] With respect to the merits, the applicants submit that Madam Justice Gropper erred in:

(a) failing to limit the scope of discovery to the certified common issues;

(b) conflating the distinct issues of relevance and proportionality; and

(c) expanding the scope of the certified common issues.

[5] I will begin by saying that I can find nothing in Madam Justice Gropper's reasons which suggests that she conflated the issues of relevance and proportionality. Her discussion of proportionality is linked to her discussion of the scope of discovery, but I see nothing in that discussion, or in her conclusion regarding the scope of discovery, which suggests that she conflated the concept of proportionality with that of relevance.

[6] The other two proposed grounds of appeal, (a) and (c) are related. The applicants submit that Madam Justice Gropper misinterpreted the import of several Ontario decisions concerning the scope of discovery in class proceedings, which, in turn, led her to grant an overly broad right of discovery in this case. The applicants submit that the tenor of the Ontario decisions is that the scope of discovery in class action proceedings "is generally defined by and limited to the common issues", as stated by Strathy J. in *Ramdath v. George Brown College of Applied Arts and Technology*, 2012 ONSC 2747, albeit in a different context. The applicants submit that Madam Justice Gropper permitted discovery which went beyond the common issues and she erred in so doing.

[7] Madam Justice Gropper clearly identified the issue before her as "the proper scope of examination for discovery in the context of class proceedings." She then set out the common issues which had been certified. She noted that the scope of examination for discovery under the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 ["*Rules*"], is broad, and that s. 17(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ["*CPA"*] provides that parties to a class proceeding have the same rights of discovery as under the *Rules*. She then referred to three Ontario decisions on the scope of discovery in the context of class proceedings. In her view, those decisions did not stand for any absolute proposition that discovery was strictly limited to the common issues. In that regard, she referred to *Andersen v. St. Jude Medical, Inc.,* 2010 ONSC 4708, and quoted para. 38 of that decision, which states:

> In a civil proceeding, the relevance of the facts to the issues in the proceeding is usually determined with reference to the claims and defences raised in the pleadings. In the context of a class proceeding, relevance is also governed by the common issues that have been certified for trial, and not by

> any individual issues that remain. It is therefore the certification order as informed by the pleadings that define relevance for this phase of the trial: [Citations omitted.]

[8] I am not persuaded that there is an arguable case that Madam Justice Gropper erred in her interpretation of the Ontario authorities, or that they restrict discovery strictly to the common issues as an absolute principle, as the applicants appear to suggest.

[9] In the result, she concluded that the scope of discovery in class proceedings should be governed by the usual rules for discovery regarding materiality and relevance, but with the key determinant of materiality and relevance being the certified common issues. At para. 26 of her decision, she states:

> I find the scope of examination for discovery in the context of class proceedings shall also be defined broadly. It will not be limited by the common issues. Questions led in examination shall be subject to the evidentiary principles of materiality and relevance, the key determinant of relevance and materiality being the certified common issues.

[10] She then applied that interpretation to the questions before her. She found that the categories of questions labelled “Over-Promotion”, “Endometrial Cancer”, and “Sales Information” consisted of questions which were both material and relevant to the common issues and that they should be answered.

[11] The applicants challenge Madam Justice Gropper’s finding that these questions were relevant to one or more common issues. I see no merit to this argument with respect to the categories labelled “Over-Promotion” and “Sales Information”, which Gropper J. linked to the common issues of breach of the duty of care, and causation in the context of the negligence claim.

[12] The link between any of the common issues and the category of questions relating to “Endometrial Cancer” (the applicants refer to this category as “Endometrial Hyperplasia”) is less obvious and is not clearly stated in the reasons for judgment. The respondent submits, however, that the information the applicants had with respect to a possible link between these drugs and endometrial cancer is highly

relevant to whether, and when, the applicants knew, or ought to have known, of a possible link between these drugs and breast cancer. The respondent submits that this information is clearly linked to both the duty of care and the standard of care, and is elaborated upon in the pleadings, as particularized. In other words, the respondent refers both to the common issues and the related pleadings, as particularized, as demonstrating the relevance of these questions. I am persuaded that this analysis is essentially correct such that there is no arguable case to be made that Madam Justice Gropper erred in compelling answers to questions falling under this category.

[13] In the result, this was a discretionary order made by a chambers judge who has had case management of this matter for approximately seven years. It is highly unlikely that this Court would interfere with her conclusion that the discovery questions challenged on this application are relevant to the issues to be determined in the upcoming trial.

[14] In the result, I do not find that the merits of this case would favour granting leave to appeal.

[15] Nor am I persuaded that leave should be granted on the basis that this is a novel question which needs to be settled in the interests of clarifying the law in British Columbia with respect to discovery in class proceedings. While there are apparently no decisions in British Columbia dealing precisely with this point, there are countless decisions dealing with the scope of discovery generally and, as Madam Justice Gropper noted, the *CPA* provides the same rights of discovery for parties to a class proceeding as provided under the *Rules*. While these rights have to be adapted to fit the nature of the proceedings, it does not appear that this has presented a problem in British Columbia that needs to be resolved.

[16] The issues raised on appeal are significant to the applicants, but that will almost invariably be the case on applications for leave to appeal.

[17] Finally, I note that this application was brought at a time when the trial was set to be heard in September and October 2013. Counsel advised that the commencement of the trial has now been moved to October 2014. For that reason, granting leave to appeal would probably not significantly hinder the progress of the proceeding. While this is a factor to consider in determining whether to grant leave to appeal, in this case it does not carry the day.

[18] In the result, taking all of these factors into account, I would dismiss the application for leave to appeal.

"The Honourable Madam Justice Prowse"