IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bartram v. GlaxoSmithKline Inc.,*
2012 BCSC 1804

Date: 20121203
Docket: S081441
Registry: Vancouver

Between:

Meah Bartram, and Infant,
by her Mother and Litigation Guardian, Faith Gibson,
and the said Faith Gibson

Plaintiffs

And

GlaxoSmithKline Inc. and GlaxoSmithKline UK Limited

Defendants

Before: The Honourable Mr. Justice N. Smith

Corrected Judgment: The text on the first page of the judgment was corrected, two names were added for Counsel for the Plaintiff on December 6, 2012

Reasons for Judgment

Counsel for Plaintiffs:	D.M. Rosenberg, Q.C. D. Klein, G.T. Kosakoski
Counsel for Defendants:	W.W.J.G. McNamara, T.J. Walsh, R.C. Sutton
Place and Date of Trial/Hearing:	Vancouver, B.C. October 1, 2, 2012
Place and Date of Judgment:	Vancouver, B.C. December 3, 2012

[1] The plaintiffs seek certification of a class action against the manufacturer of an antidepressant drug that is alleged to have caused birth defects in children whose mothers used it while pregnant. They say the defendant knew or ought to have known of the risk and failed to provide adequate and timely warning to doctors prescribing the drug and to the general public.

[2] According to the statement of claim, the infant plaintiff Meah Bartram was born on September 14, 2005, with a ventricular septal defect--in simple terms, a hole in her heart. Her mother, the adult plaintiff Faith Gibson, was first prescribed the antidepressant Paxil in December, 2002, and continued to take it throughout her pregnancy.

[3] Paxil is the trade name for a drug, also known as paroxetine, that belongs to a category of antidepressant medications called selective serotonin reuptake inhibitors ("SSRIs"). The defendant GlaxoSmithKline Inc. (“GSK”) manufactures, markets and sells Paxil throughout Canada.

[4] Information suggesting an association between the use of Paxil in pregnancy and cardiovascular defects in newborns was first published by GSK shortly after Meah Bartram was born, but the plaintiffs allege that GSK knew or ought to have known of the risk before then. Ms. Gibson says in an affidavit that if she had been aware that there were any possible consequences to her child from taking Paxil, she would have taken a different anti-depressant or none at all.

[5] The plaintiffs ask that Ms. Gibson be appointed representative plaintiff on behalf of a class defined as:

> any person in Canada, born with cardiovascular defects, to women who ingested Paxil while pregnant, and the mothers of those persons.

[6] Paxil was first approved for use in Canada in 1993, and is currently approved for treatment of major depressive disorder, panic disorder, social phobia/social anxiety disorder, obsessive-compulsive disorder, generalized anxiety disorder and post-traumatic stress disorder.

[7] The manufacturer of a prescription drug is required to publish a product monograph. This is a scientific document that describes in detail the properties, claims, indications and conditions of use of a drug, as well as information that may be required for optimal, safe and effective use. It is regarded as "labeling" in Canada and its wording is approved as part of the process by which Health Canada approves the drug for sale in this country. The product monograph is available for reference by doctors who prescribe the drug, as well as by members of the public. It is often revised, with Health Canada's approval, to reflect new information.

[8] The original Paxil monograph included the statement:

> Pregnancy and Lactation: Although animal studies have not shown any teratogenic or selective embryotoxic effects, the safety of PAXIL in human preganancy has not been established. PAXIL should not be used during pregnancy unless the potential benefit to the patient outweighs the possible risk to the fetus.

[9] A revised monograph issued in September, 2004, repeated that statement, but also reported respiratory and other complications requiring prolonged hospitalization of some newborns who had been exposed to Paxil during the third trimester of pregnancy. It added that physicians treating a patient with Paxil during the third trimester should “carefully consider the potential risks and benefits of treatment.”

[10] GSK’s first published reference to the kind of condition at issue in this case came in a letter it sent to physicians and other health professionals dated September 29, 2005--two weeks after the birth of the infant plaintiff. That document referred to preliminary results of an epidemiological study showing an increased incidence of cardiovascular defects, most commonly ventricular septal defects, in babies born to women who had taken Paxil or similar drugs during the first trimester. The letter recommended that doctors “carefully evaluate this new information when considering the use of paroxetine in women who are pregnant or planning pregnancy.”

[11] Further information was published in the following months and on February 3, 2006, the product monograph was amended to read, in part:

> Pregnant Women and Newborns: Epidemiological studies of pregnancy outcomes following maternal exposure to antidepressants in the first trimester have reported an increase in the risk of congenital malformations, particularly cardiovascular (e.g. ventricular and atrial septal defects), associated with the use of paroxetine. The data suggest that the risk of having an infant with a cardiovascular defect following maternal paroxetine exposure is approximately 1/50 (2%), compared with an expected rate for such defects of approximately 1/100 (1 %) infants in the general population. In general, septal defects range from those that are symptomatic and may require surgery, to those that are asymptomatic and may resolve spontaneously. Information about the severity of the septal defects reported in the studies is not available.
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> If a patient becomes pregnant while taking PAXIL®, or intends to be become pregnant, she should be informed of the current estimate of increased risk to the fetus with PAXIL® over other antidepressants. Examinations of additional databases, as well as updated analyses, may result in changes to the current risk estimates. Consideration should be given to switching to other treatment options, including another antidepressant or non-pharmaceutical treatment such as cognitive behavioral therapy. Treatment with PAXIL® should only be continued for an individual patient, if the potential benefits outweigh the potential risks…
>
> Initiation of paroxetine: For women who intend to become pregnant, or are in their first trimester of pregnancy, initiation of paroxetine should be considered only after other treatment options have been evaluated.

That statement continues to appear in the product monograph.

[12] In 2003, Health Canada approved a controlled release formulation of paroxetine under the name Paxil CR. The product monograph originally contained the same statement about use in pregnancy as in the first Paxil monograph and has evolved in the same way.

[13] The certification of a proceeding as a class action is governed by s. 4 of the *Class Proceedings Act*, RSBC 1996, c. 50, s. 4 (*CPA*) which reads:

> 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;

(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;

(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.

[14] The plaintiffs seek orders certifying the following issues as common issues:

a) Did Paxil cause or increase the likelihood of birth defects?

b) Is Paxil unfit for its intended purpose?

c) Did the Defendant, GLAXOSMITHKLINE INC. fail to warn class members and/or Health Canada of the true risk of birth defects caused by using Paxil?

d) Did the Defendant, GLAXOSMITHKLINE INC. breach a duty of care to class members and if so, when and how?

e) Does the conduct of Defendant, GLAXOSMITHKLINE INC. warrant an award of punitive damages, and if so, what amount of punitive damages should be awarded?

> f) Did the Defendant, GLAXOSMITHKLINE INC.'s solicitations, offers, advertisements, promotions, sales and supply of Paxil for personal use by class members fall within the meaning of "consumer transactions" in the *Business Practices and Consumer Protection Act* [SBC 2004 c. 57] (the "BPCPA")?
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> g) With respect to the sales in British Columbia of Paxil to class members for their personal use, was the Defendant, GLAXOSMITHKLINE INC. a "supplier" as defined in the BPCPA?
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> h) Are the class members "consumers" as defined by the BPCPA?
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> i) Did the Defendant, GLAXOSMITHKLINE INC. engage in conduct, as alleged in the Statement of Claim, that amounted to deceptive acts or practices contrary to the BPCPA?
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> 5. if the Court finds that the Defendant, GLAXOSMITHKLINE INC.' s conduct was contrary to the BPCPA should a monetary award be made in favour of the class and, if so, in what amount?

[15] The *CPA* came into force in 1995. In *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260 at para 3, the Court of Appeal said that, after 17 years of experience, “certain issues have been settled and guiding principles (including those expressed in the *Act*) have emerged” to determine applications for certification. That clarification process should by now have made many certification applications less complex and more capable of expeditious resolution. But one would not know that from this application, in which the parties have seen fit to provide the court with more than 80 case authorities from this and other Canadian jurisdictions.

[16] Notwithstanding the mass of authority with which I have been provided, the guiding principles that are binding on me were succinctly summarized in *Stanway*:

> [4] In *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15, Chief Justice McLachlin discussed three important advantages of class actions over a multiplicity of individual suits:
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> > 15 ... First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.

> [5] In light of these advantages, McLachlin C.J.C. instructed courts not to take "an overly restrictive approach to the legislation, but rather [to] interpret the Act in a way that gives full effect to the benefits foreseen by the drafters" (at para. 15).
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> [6] At para. 16, she further underscored the limited nature of the inquiry on certification:
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> > [16] ... the certification stage is decidedly not meant to be a test of the merits of the action: see *Class Proceedings Act, 1992*, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action ...
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> [7] Although the certification stage does not entail a test of the merits of an action, the representative plaintiff must still establish an evidentiary basis for the certification requirements provided in the *Act*, other than the requirement that the pleadings disclose a cause of action: *Hollick*, *supra*, at para. 25; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 at para. 25, 46 B.C.L.R. (4th) 234. [...]
>
> [8] Although the determination of common issues often proves contentious, they need not be determinative of liability for certification. The resolution of a single common issue does not have to provide a sufficient basis for relief. For common issues to be certifiable, they need only be "issues of fact or law that move the litigation forward": *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 at para. 53, 98 B.C.A.C. 22 (C.A.), *per* Cumming J.A., for the Court.
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> [9] In addition, commonality should be approached purposively, in light of the underlying question of whether class proceedings will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39, [2001] 2 S.C.R. 534, *per* McLachlin C.J.C.

[17] The issues in *Stanway* were very similar to those in this case. The plaintiff in *Stanway* alleged that hormone therapy drugs prescribed to women to treat the symptoms of menopause caused breast cancer. This case differs in that Paxil was not prescribed only to women, much less only to pregnant women, so the alleged danger applies only to a small segment of Paxil's market. This case also alleges a closer temporal connection between any individual's use of the drug and the injury. Injuries discovered at or shortly after birth are alleged to be related to use of Paxil in the first trimester of pregnancy.

Cause of Action

[18] The first requirement for certification, set out in s. 4(1)(a) of the *CPA*, is that the pleadings disclose a cause of action. The statement of claim, which was filed under the former Rules of Court, alleges:

> 21. As a result of the teratogenetic effect of Paxil, it was inherently dangerous when taken by pregnant women.
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> 22. The Defendants at all material times owed a duty of care to the Plaintiffs to:
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> a. ensure that Paxil was fit for its intended or reasonably foreseeable use;
>
> b. conduct appropriate testing to determine whether and to what extent ingestion of Paxil posed serious health risks to pregnant women, including the risk of serious adverse complications for newborn children of mothers who ingest Paxil during pregnancy; and
>
> c. warn the Plaintiff, Faith Gibson and her physicians that the ingestion of Paxil carries the risk of serious adverse complications for newborn children of mothers who ingest Paxil during pregnancy.
>
> 23. The Defendants negligently breached their duty of care, particulars of which are set out in the following paragraph.

[19] The following paragraph of the statement of claim lists 17 particulars of negligence, including failure to adequately test Paxil, failure to conduct adequate follow up studies, failure to provide complete and accurate information to Health Canada, failure to warn physicians and patients of the risk of cardiovascular complications and misrepresentation of the state of research and medical literature.

[20] Leaving aside the question of whether the plaintiffs will be able to prove any or all of those allegations, there can be no doubt that they state a cause of action in negligence. In *Hollis v. Dow Corning Corp.*, [1995] 4 SCR 634, the Supreme Court of Canada said at para 23:

> [23] ... Medical products are often designed for bodily ingestion or implantation, and the risks created by their improper use are obviously substantial. The courts in this country have long recognized that manufacturers of products that are ingested, consumed or otherwise placed in the body, and thereby have a great capacity to cause injury to consumers,

> are subject to a correspondingly high standard of care under the law of negligence. Given the intimate relationship between medical products and the consumer's body, and the resulting risk created to the consumer, there will almost always be a heavy onus on manufacturers of medical products to provide clear, complete and current information concerning the dangers inherent in the ordinary use of their product. [Citations omitted.]

[21] Although the alleged particulars of negligence cover a broad range of conduct, I do not accept the defendant's argument that the claim is "unfocussed" or that it improperly combines distinct forms of negligence in a way that will make it difficult to determine how each claim relates to the common issues. Not yet having had the advantage of discovery, which may assist in narrowing the claim, the plaintiffs had no choice but to state particulars that cast as wide a net as possible.

[22] The plaintiff's also allege a separate cause of action under the *Business Practices and Consumer Protection Act,* SBC 2004, c. 2. (*BPCPA*) The relevant provisions of that legislation are:

> 4 (1) In this Division:
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> "deceptive act or practice" means, in relation to a consumer transaction,
>
> (a) an oral, written, visual, descriptive or other representation by a supplier, or
>
> (b) any conduct by a supplier
>
> that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;
>
> "representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.
>
> (2) A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.
>
> (3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:
>
> (a) a representation by a supplier that goods or services
>
> (i) have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have,
>
> (ii) are of a particular standard, quality, grade, style or model if they are not,
>
> ...

[23] In *Stanway*, the Court of Appeal confirmed that non-disclosure of a material fact can ground a cause of action under the *BPCPA* and upheld the trial judge's certification of a claim against a drug manufacturer. For the purposes of this issue in the certification application, I find this case to be indistinguishable from *Stanway*.

Identifiable Class

[24] Section 4(1)(b) of the *CPA* requires an identifiable class of two or more persons. Evidence put forward by the defendant shows that between 1993 and 2009, almost six million Paxil prescriptions were written for women of child-bearing age. One study has identified 20 adverse cardiovascular effects in newborns who had been exposed to Paxil in utero. A similar class action has been proposed in Saskatchewan but is not proceeding. Counsel in that case deposes that his office was contacted by 42 women who were potential class members.

[25] Counsel for the defendant argues that the class proposed would include individuals who used Paxil over too long a period, during which the state of knowledge and the standard of care were evolving. A similar argument was rejected in *Stanway*:

> [60] Wyeth submits that the 27-year class period is unmanageable in the context of the changing scientific knowledge regarding the risks of hormone therapy. Wyeth contends that there is no commonality because its duty of care must be assessed at a specific period of time. Wyeth submits that the evolving medical knowledge and the concomitant changing prescribing information precludes a finding of a single common standard of care for the entire 27-year class period.
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> [61] There may well be challenges in assessing the duty of care (and the standard of care) over the 27-year class period. Similar concerns arose in *Rumley*, but the Supreme Court of Canada concluded that the common question was capable of a "nuanced answer". It is too early to say in this case what shape that answer might take, but one obvious potential solution would be the development of sub-classes defined by reference to the changing product monographs. If the class period proves to be truly unmanageable, it is open to the court to decertify the action. These are refinements that can be addressed as the litigation progresses.

[26] In this case, the plaintiff's proposed class would cover a period from 1993, when Paxil first went on the market, to date. That may not be the class that

ultimately proceeds to trial or that may be successful at trial. For example, even if the plaintiffs prove that GSK failed to disclose what it knew or should have known, the evidence may show a date before which GSK could not reasonably have had the critical information and/or a date after which it made adequate disclosure. Such a result would narrow the class period and disqualify many potential class members, perhaps to the point where, as the defendant suggests, the class would become vanishingly small. But in my view it is premature to speculate on such matters and I find that on the evidence now before me, there is an identifiable class.

The Proposed Common Issues

1) Did Paxil cause or increase the likelihood of birth defects?

[27] The parties have put forward conflicting expert evidence on the issue of causation. The defendant relies on the evidence of Dr. Edward Lammer, a pediatrician and medical geneticist, who says that every woman has a three per cent chance of giving birth to a baby with a congenital malformation. He adds that the causes of such malformations are diverse, that no single agent can cause all of them and only about one per cent of all major congenital malformations are caused by exposure to chemicals, medications or radiation. He says the causative role of Paxil, if any, must be determined on a case-by-case basis.

[28] The plaintiffs rely on the evidence of an epidemiologist, Shira Kramer, who says there is a “consistent body of epidemiological research” that establishes that Paxil causes cardiovascular birth defects.

[29] It is neither necessary nor appropriate on a certification application to weigh that evidence or to consider the limitations of each witness’s expertise. In any case, GSK’s own published material has acknowledged that epidemiological studies suggest that the use of Paxil during pregnancy is associated with at least an increased risk of cardiovascular defects in newborns.

[30] Authorities such as *Harrington v. Dow Corning Corp*., 2000 BCCA 605, establish the distinction between general and individual causation. In the context of

this case, the general causation question is whether Paxil is capable of causing cardiac birth defects and, if so, which ones. That will depend on expert evidence that will be applicable to the claim of all class members.

[31] If the plaintiffs fail to prove general causation, that will be the end of the matter. If they succeed, it will then be up to each individual plaintiff to show that the injury that occurred was of a kind that can be caused by Paxil and was in fact one that would likely not have occurred but for the use of Paxil.

[32] In an individual action, a plaintiff probably could not succeed by merely showing that the use of Paxil increased the risk of injury. In *Clements v. Clements*, 2012 SCC 32, the Supreme Court of Canada re-affirmed the primacy of the "but for" test in proving causation and confined the alternate "material contribution" test to cases involving multiple negligent defendants where it is not possible to prove which one caused the injury. However, *dicta* in *Clements* may leave open an argument that different considerations apply in cases involving multiple plaintiffs, such as class actions.

> [44] This is not to say that new situations will not raise new considerations. I leave for another day, for example, the scenario that might arise in mass toxic tort litigation with multiple plaintiffs, where it is established statistically that the defendant's acts induced an injury on some members of the group, but it is impossible to know which ones.

[33] Depending on what findings the court makes on some of the other common issues, each individual adult plaintiff may also have to prove that a reasonable person in her position, having been informed of the risk of taking Paxil and of the countervailing risks of changing or discontinuing treatment, would have stopped taking Paxil.

[34] One should not minimize the difficulties each plaintiff may face in proving individual causation, but those issues will be irrelevant without a finding on general causation, which is clearly a common issue.

[35] I would, however, narrow the question to whether Paxil causes or increases the likelihood of cardiovascular birth defects. That is the type of defect alleged in the case of the proposed representative plaintiff and is the only type referred to in the proposed class definition.

2) Is Paxil unfit for its intended purpose?

[36] There is no evidence that Paxil is generally unfit for its intended use in treating depression and other psychiatric conditions. This case relates only to its use for a specific group of patients. The question should more properly be phrased as whether Paxil is unfit for use during pregnancy.

[37] That issue is inextricably tied to the general causation issue. Whether Paxil is unfit for use during pregnancy will depend on whether it is capable of causing cardiovascular birth defects, which ones, and the magnitude of the risk. If the plaintiffs prove that the risk was so great that Paxil should not have been given to any pregnant women, such a finding will apply to all class members. On the other hand, if the plaintiffs are only able to prove a failure to disclose a risk that had to be balanced against other risks and benefits, it will be necessary for each class member to prove that a reasonable person in her position would have stopped taking Paxil.

3) Did GSK fail to warn class members and/or Health Canada of Paxil's true risk?

[38] The essence of this issue is--to use a popular formulation--"what did GSK know and when did it know it?" The plaintiffs have produced evidence on this application that, at some point, GSK became aware of and disclosed information that associated Paxil, at least on a statistical basis, with an increased incidence of cardiovascular defects. The question is whether the information published by GSK at any given time reflected all that it knew or ought to have known, and whether the warnings it issued could and should have been issued at an earlier date. Evidence on those points is likely to be largely, if not entirely, within the control of GSK and would only become available to the plaintiffs through the discovery process.

[39] The plaintiffs rely in part on a transcript of testimony given by a witness in an American proceeding relating to the times when, in the opinion of that witness, the danger was, or should have been, known. The defendant objects to that evidence as hearsay and I agree the transcript alone would not be admissible at trial. That does not necessarily make the evidence inadmissible on a certification application, but I do not need to decide the point because the evidence is unnecessary for present purposes. The information that GSK itself made public, combined with the fact that it alone controls the evidence of what else it may or may not have known and when, constitutes a sufficient evidentiary basis at this stage of the proceedings.

[40] The defendant relies on the evidence of the Dr. Anthony Scialli, an obstetrician and gynecologist, who says that many pregnant women must be treated for depression, and risk-benefit considerations of whether to use Paxil will depend on each woman's personal circumstance and the nature of her psychiatric condition. That may be so, but the threshold issue relating the adequacy and timeliness of information and warnings about the safety of Paxil use during pregnancy will be the same for all plaintiffs.

[41] All potential class members and/or their treating doctors had to rely on the same published material. If there was a point at which developing knowledge made that material incomplete, misleading or inadequate, each class member may still have to separately prove that she was pregnant after that point and that, if fully informed, she could or would have safely stopped taking Paxil. However, that does not diminish the commonality of the threshold issue.

4) Did GSK breach a duty of care to class members and, if so, when and how?

[42] This issue is linked to the previous ones and, depending on what findings are made on the other issues, the answer may be self evident. But for present purposes, I find it to be clearly a common issue.

5) Punitive Damages

[43] In *Stanway*, the case management judge certified a similar common issue and relied on *Chalmers v. AMO Canada Company*, 2010 BCCA 560, where the Court of Appeal said:

> [31] Although the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, it does not follow, in my opinion, that no aspect of the claim of punitive damages should be certified as a common issue. It is my view that the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the trial in this proceeding where the other common issues will be determined. The focus will be upon the defendants' conduct, and there is nothing in this case that will require a consideration of the individual circumstances of the class members in order to determine whether the defendants' conduct is deserving of punishment. The ultimate decision of whether punitive damages should be awarded, and the quantification of them, can be tried as a common issue following the completion of the individual trials.

[44] I am satisfied that the same approach should be followed in this case and find the claim for punitive damages to be a common issue.

Claims under the *BPCPA*

[45] The proposed issues under the *BPCPA* deal with the same alleged representations, or "representations by omission", as the common issue of failure to warn. The plaintiffs rely on the *BPCPA* to seek additional or alternate remedies. I adopt what was said by the case management judge in *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057:

> [61] The plaintiff asserts a statutory claim under the *BPCPA*. The *BPCPA* concerns conduct and representations which a supplier directs to the "world at large" in the marketing of its products as opposed to specific interactions between a supplier and an individual customer. The question of whether a representation is deceptive or misleading does not require an individual enquiry: *Wakelam v. Johnson & Johnson*, 2009 BCSC 839 at para. 39.
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> ...
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> [64] I agree with the plaintiff that the objective nature of the statutory cause of action under the *BPCPA* is suited for class treatment. The participation of individual class members is not necessary to determine whether the defendants have breached the statute.

Preferability

[46] Having found that common issues exist, I am required by s. 4(1)(d) of the *CPA* to determine if a class proceeding is the preferable procedure. The question is whether, in the circumstances of this case, a class action would be preferable and, in particular, whether it would be preferable to individual proceedings. *Hollic v. Toronto (City)*, [2001] 3 SCR 158. The Court of Appeal in *Stanway* added:

> [87] There can be no doubt that the individual claims will face significant challenges of proof. The multiplicity of causative factors in the development of breast cancer and the role of learned intermediaries will certainly complicate the trial of individual claims. However, there can also be no doubt that the determination of the common issues will move the litigation forward, serve judicial economy, and improve access to justice.

[47] The common issues will require extensive discovery to determine the state of GSK's knowledge at various times, expert evidence on the general state of scientific knowledge and research at those same times, and expert evidence on the general causation issue. I can think of nothing that would be less efficient, more costly and more limiting of access to justice than requiring each class member to separately obtain and adduce the same evidence. Given the complexity and costliness of doing so, I doubt that the issues raised could be litigated in any procedure but a class action.

Representative Plaintiff

[48] I am satisfied that Ms. Gibson is a representative plaintiff who can adequately represent the class. I recognize that her claim may be broader than that of some class members in that, as a British Columbia resident, she can advance a claim under the *BPCPA*. However, given the large overlap in what must be proved in that claim and in the negligence claim, I see no conflict with other class members. If, as the matter proceeds, such a conflict becomes apparent, the court may appoint a second representative plaintiff to represent class members outside the province.

[49] I am also satisfied that Ms. Gibson has produced a case management plan that, while still general, demonstrates proper consideration of how the action can

proceed, and that can be modified as necessary. The plan specifically provides for further hearings to determine some matters in greater detail, such as the terms and manner of giving notice to class members.

[50] The defendant objects to the proposed management plan, in part because it fails to fully address how the individual causation analysis is to be dealt with for each putative class member. I do not consider it either realistic or necessary to consider that issue in any detail at this stage. The individual issues will not need to be addressed at all unless the plaintiff succeeds on the trial of the common issues.

Conclusion

[51] The application to certify this proceeding as a class proceeding is granted, with Ms. Gibson as the representative plaintiff. The class definition and common issues will be as set out in the notice of application, subject to the modifications I have made in paras 35 and 36 above.

"N. Smith J."