

CITATION: Banerjee v. Shire Biochem Inc. et al., 2010 ONSC 889
Court File No. 05-CV-293457 CP
Date: 20100208

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SWAPAN BANERJEE

Plaintiff

- and -

SHIRE BIOCHEM INC., DRAXIS HEALTH INC.,
ELI LILLY CANADA INC. and ELI LILLY AND COMPANY

Defendants

Proceeding under the Class Proceedings Act, 1992

BEFORE: G. R. Strathy J.

COUNSEL: *L. Craig Brown & Darcy Merkur*, for the plaintiff

Sylvie Rodrigue & Kelly Friedman, for the defendants, Eli Lilly Canada Inc.
and Eli Lilly and Company

Malcolm Ruby, for the defendant, Shire Biochem Inc.

Chris Hubbard & Keegan Boyd, for the defendant, Draxis Health Inc.

DATE HEARD: October 26, 2009 and by teleconferences

DECISION ON CERTIFICATION

[1] This is a motion for certification of a product liability class action and for authorization of a pilot project to permit the parties to explore settlement. The motion was heard on October 26, 2009 but the release of these reasons has been deferred pending the resolution of issues arising from a parallel Québec action: *Lepine v. Shire BioChem et al.* (Québec Court File No. 500-06-000464-095) (the "Québec Action"). As I will explain shortly, those issues have been resolved and the Québec Action has been stayed.

[2] The proposed representative plaintiff, Swapan Banerjee, is 51 years old. He claims that he developed a compulsive gambling addiction as a result of being treated with the drug Permax, which he was prescribed in 2000 for the treatment of Parkinson's disease. He claims to have lost in excess of \$200,000. He became alienated from his family and friends and suffered depression, anxiety, guilt and embarrassment. When he ceased taking Permax in 2003, for reasons unrelated to his gambling problem, his compulsive behaviour stopped.

[3] Permax was developed by the defendants Eli Lilly Canada Inc. and Eli Lilly and Company (collectively, "Eli Lilly") and was prescribed primarily for the treatment of people with Parkinson's. It was initially distributed in Canada by the defendant Draxis Health Inc. ("Draxis") and later by the defendant Shire Biochem Inc. ("Shire").

[4] Mr. Banerjee says that the defendants failed to adequately warn him and class members that Permax can cause compulsive self-rewarding behaviour, including pathological gambling. He says that he would have taken appropriate precautions had he been warned of the dangerous side effects of the drug.

[5] The parties have reached an agreement in principle, which permits certification, on consent, against the Defendants Eli Lilly and Shire, subject to the approval of the court and on terms that will be outlined below. The parties, other than Draxis, have also agreed to participate in a pilot project that is designed to identify class members with potentially compensable claims and to obtain information concerning the number, nature and monetary value of those claims.

Counsel for the parties anticipate that this information will provide a factual underpinning to facilitate discussions about the resolution of the claims of the class. Draxis does not agree to certification against it, nor does it agree to participate in the pilot project. It does agree, however, that the issue of certification of the action against it will be deferred, to be revived if necessary, after the pilot project has been completed.

[6] For the reasons set out below, I will grant an order certifying this action as a class action pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "C.P.A."). I will also approve the pilot project. While this project will suspend the ordinary progress of this action, for a period of about 12 months, it is my view that this is a reasonable step in the circumstances and should be approved by the court.

Background

[7] Parkinson's is a degenerative disorder of the central nervous system. The symptoms of this disorder – tremor, stiffness and slowed movement – are caused, in the most general sense, by the insufficient production of dopamine in the brain. Dopamine is called a "neurotransmitter" – a chemical that relays signals between neurons and other cells. Permax is among a group of drugs called "dopamine agonists" that mimic the effect of dopamine and stimulate the dopamine receptors in the brain.

[8] In one of nature's extraordinary and elegant survival mechanisms, dopamine is also associated with the pleasure system of the brain. It is believed that dopamine is released when people have naturally rewarding experiences, such as eating or engaging in sexual activity. Dopamine provides feelings of enjoyment that reward the behaviour and encourage its repetition. Humans are wired to nourish themselves and to reproduce because dopamine makes them experience pleasure when they do so.

[9] Permax was approved in 1989 for marketing and sale in the United States for the treatment of the symptoms of certain movement disorders, including Parkinson's. It was approved for sale in Canada in September, 1991. The sale of Permax in Canada ended on August 30, 2007 for reasons having nothing to do with the allegations in this action.

[10] The plaintiff alleges that by as early as 1989, or shortly thereafter, the defendants knew or ought to have known that there was a serious risk of behavioural changes as a result of the ingestion of Permax. For a very small group of Permax users, the drug allegedly caused malfunctions in the brain's circuitry, lead to inappropriate self-rewarding behaviours. These behaviours included compulsive gambling, hyper sexuality, compulsive shopping and obsessive skin-picking.

[11] Each party has produced expert evidence on this issue. The plaintiff's expert pharmacologist, Dr. Celeste Napier, a Professor of Pharmacology at Rush University in Chicago, expresses the opinion that Permax can cause compulsive behaviour and that the drug manufacturer failed to properly test the drug and adequately warn the public of the risks. The experts retained by the defendants, who have equally impressive credentials, question the cause and effect relationship between Permax and obsessive behaviour and in any event dispute that there was a duty to warn throughout the material time.

[12] This action was commenced on July 19, 2005. It was proposed as a national class action on behalf of all Permax users in Canada. The Québec Action was commenced in 2008. Counsel in this action and in the Québec Action have been advancing the claims in a coordinated manner. The parties in the two actions have agreed that the Québec Action will be stayed in order to permit this action and the pilot project to proceed on a national basis and an order to that effect was made by Madam Justice Richer in the Québec Action on January 28, 2010. That order contemplated, and I will provide, that a sub-class of Québec residents be created in this action.

[13] I will begin by examining the action in terms of the test for certification set out in s. 5 of the *C.P.A.* I will then examine the proposed pilot project.

The Test for Certification

[14] The *C.P.A.* is entirely procedural. In the event that s. 5 of the Act is satisfied, certification is mandatory. Section 5(1) states that the Court "shall" certify a class proceeding if:

- (a) the pleadings or the notice of action disclose a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
- (c) the claims or defences of the Class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the Class;
 - (ii) has a plan which sets out a workable method for the advancement of the proceeding on behalf of the Class, including notification of class members; and
 - (iii) does not, on the common issues, have an interest in conflict with the interests of other class members.

[15] A certification motion is not an assessment the merits of the action. The court is not required to determine whether the plaintiff's claims are likely to succeed. The issue is simply whether the action "can be appropriately prosecuted as a class action": *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 (C.A.), at para. 38, leave to appeal to S.C.C. refused May 12, 2005, [2005] S.C.C.A. No. 50. Other than the requirement that the pleadings disclose a cause of action, the class representative is required to show "some basis in fact for each of the certification requirements set out in s. 5 of the Act": *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, at para. 25.

[16] The consent of the defendants to certification does not lessen the responsibility of the plaintiff to demonstrate that the requirements of section 5(1) of the *C.P.A.* have been met and that the case is indeed appropriate: *Vezina v. Loblaw Companies Ltd.* (2005), 17 C.P.C. (6th) 307, [2005] O.J. No. 1974 (Sup. Ct.). Certification affects the rights of the entire class, who will be bound by the judgment or by a court-approved settlement. It is important, therefore, that the court determine that the proceeding is appropriate for prosecution as a class action.

(a) Cause of Action

[17] The plaintiff states that the defendants:

- (a) negligently breached their duty of care;
- (b) are strictly liable;
- (c) are liable for breach of express and/or implied warranty, including breach of warranty under various provincial statutes such as the *Sale of Goods Act*, R.S.O. 1990, c. S.1; and
- (d) are liable for negligent and/or fraudulent misrepresentation.

[18] It is alleged that the defendants, among other things:

- failed to conduct adequate tests to determine the risks associated with the use of Permax;
- manufactured and sold Permax without adequately disclosing the increased risk of compulsive and/or obsessive behaviour associated with the drug;
- failed to give Health Canada accurate information concerning Permax;
- failed to adequately warn class members and their physicians of the known or reasonably foreseeable risks of using Permax;
- failed to warn class members and their physicians about the need for behavioural monitoring to ensure early discovery of compulsive and/or obsessive behaviour resulting from the use of Permax; and
- failed to adequately monitor, evaluate and act upon adverse reactions to Permax in Canada and throughout the world.

[19] The claim asserts that class members have suffered damages as a result of the defendants' conduct, including, but not limited to, general damages for pain and suffering and loss of reputation. The plaintiff also seeks special damages including gambling losses, loss of earnings, medical and other bills and expenses, and future medical treatment relating to the consequences of the drug. The claim further alleges that the conduct of the defendants justifies an award of punitive, exemplary, and/or aggravated damages.

