

CITATION: *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 1942  
COURT FILE NO.: 05-CV-288851CP  
DATE: 20110328

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**RE:** Gerry Schick, Plaintiff/Moving Party

**AND:**

Boehringer Ingelheim (Canada) Ltd., Defendant/Respondent

**BEFORE:** G.R. Strathy J.

**COUNSEL:** *A. Farrer, C. Brown & S. Birman*, for the Plaintiff/Moving Party

*S. Maidment, L. Parliament & R. Barrass*, for the Defendant/Respondent

**HEARD:** March 1 & 2, 2011

**REASONS FOR JUDGMENT - CERTIFICATION**

[1] This is a motion for certification of this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (the “*C.P.A.*”). The defendant admits that the test for certification under s. 5 of that statute has been met. There is a dispute concerning the causes of action that should be certified and the appropriate common issues.

**Background**

[2] This is a product liability class action concerning a drug called “Mirapex”<sup>1</sup>, distributed in Canada by the defendant Boehringer Ingelheim (Canada) Ltd. (“BICL”)<sup>2</sup>. Mirapex was approved by Health Canada in 1998 for the treatment of Parkinson’s Disease (“PD”). PD is a debilitating neurological disease, characterized by loss of dopaminergic neurons in a specific location in the brain: the *substantia nigra*. Patients diagnosed with PD exhibit at least two of the following four symptoms: slowness of movement, rigidity, tremor, and postural changes. Without an adequate level of dopamine, people experience the motor and non-motor aspects of PD.

[3] In 2006, Mirapex was approved by Health Canada for the treatment of “Restless Leg Syndrome” (“RLS”). RLS is a different disease from PD, with different diagnostic features and pathophysiology. The symptoms of RLS include an urge to move the legs, unpleasant sensations in the legs that worsen during periods of rest and at night and are relieved by movement.

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<sup>1</sup> Trade name, pramipexole dihydrochloride.

<sup>2</sup> The action was originally commenced against BICL, as well as the developers of the drug, Boehringer Ingelheim Pharmaceuticals Inc. and Pfizer Inc. The latter two defendants have been released from the action on BICL’s acceptance of responsibility for their acts or omissions.

[4] The symptoms of both PD and RLS are caused, in a very general way, by a deficiency of dopamine. Dopamine acts as a messenger, which relays signals between neurons and other cells in the brain and thereby facilitates movement, posture, balance and walking. Mirapex is a member of a group of drugs called "dopamine agonists", which mimic the effect of dopamine and stimulate the dopamine receptors in the brain. Mirapex has been prescribed to some 90,000 Canadians and has unquestioned beneficial effects in the treatment of PD. It remains approved by Health Canada and is widely used in Canada.

[5] There is a body of scientific evidence that Mirapex has side effects that can include compulsive gambling, binge eating, compulsive shopping and hypersexuality. It is theorized that Mirapex operates on the part of the brain that causes humans to seek out, and engage in, pleasurable experiences such as eating and sexual activity. It is believed that Mirapex can cause some users to engage in types of compulsive behaviour that create similar positive feelings.

[6] The proposed representative plaintiff, Gerry Schick, was diagnosed with PD in 1996. He was prescribed Mirapex in 1999. He claims that while he was taking the drug, he developed a compulsive and obsessive gambling addiction. He says that as a result of his gambling, he was forced into bankruptcy, lost his home, was alienated from his family and became depressed. He brings this proposed class action on behalf of all persons resident in Canada (other than in Québec), who have been prescribed Mirapex.

### The Test for Certification

[7] The test for certification is set out in s. 5(1) of the *C.P.A.*<sup>3</sup> There must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of the behaviour of wrongdoers: *Sauer v. Canada (A.G.)*, [2008] O.J. No. 3419 at para. 14 (S.C.J.).

[8] I will discuss the various elements of the test. Where there is no dispute on its application, my reasons will be brief.

#### (a) Cause of Action

[9] The cause of action test is the same as is applied on a motion to strike a pleading under rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194 on the ground that it discloses no reasonable cause of action: "assuming that the facts as stated in the Statement of

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<sup>3</sup> "The court shall certify a class proceeding on a motion under section 2, 3 or 4 if, (a) the pleadings or the notice of application discloses a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant; (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 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 for the class, an interest in conflict with the interests of other class members."

Claim can be proved, is it 'plain and obvious' that the plaintiff's Statement of Claim discloses no reasonable case of action?": see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 at para. 33; *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641, [2005] O.J. No. 4918 (C.A.) at para. 53.

[10] The applicable principles are as follows:

- no evidence is admissible for the purposes of determining the section 5(1)(a) criterion;
- all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
- the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;
- matters of law that are not fully settled by the jurisprudence must be permitted to proceed; and,
- the pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information.

[11] I turn to an examination of the several causes of action asserted by the plaintiff.

#### *Duty to Warn*

[12] The plaintiff pleads that BICL failed to warn users of Mirapex and their physicians of the risk of developing compulsive behaviours as a result of the use of the drug.

[13] BICL acknowledges that the statement of claim discloses a cause of action in negligence based on the alleged failure to warn of the danger of compulsive gambling resulting from the ordinary use of Mirapex. It does not acknowledge a cause of action based on broader allegations of negligence.

[14] It is settled law that a manufacturer has a duty to warn consumers of dangers inherent in the use of the product of which the manufacturer has knowledge or ought to have knowledge: *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, [1995] S.C.J. No. 104 at para. 20; *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569 at 574; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, [1997] S.C.J. No. 111.

[15] Common issues arising out of allegations of breach of the duty to warn have been certified in a number of cases: see, for example, *Heward v. Eli Lilly & Co.* (2007), 39 C.P.C. (6<sup>th</sup>) 153, [2007] O.J. No. 404 (S.C.J.), per Cullity J., aff'd (2008), 91 O.R. (3d) 691, [2008] O.J. No. 2610 (Div. Ct.); *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392 (S.C.J.); *Goodridge v. Pfizer Canada Inc. et al.*, 2010 ONSC 1095, 101 O.R. (3<sup>rd</sup>) 202; *Banerjee v. Shire Biochem Inc. et al.*, 2010 ONSC 889, [2010] O.J. No. 507 (S.C.J.).

[16] The plaintiff has adequately pleaded a cause of action in negligence based on the breach of a duty to warn.

### *Negligence*

[17] The plaintiff pleads that BICL owed a duty of care to the plaintiff to ensure that Mirapex was fit for its intended or reasonably foreseeable use, that it failed to ensure that Mirapex was fit for that purpose and that it failed to conduct adequate tests of the drug. He pleads that the use of Mirapex caused him to suffer damages.

[18] The requirements of the cause of action in negligence were summarized by the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114, [2008] S.C.J. No. 27. The plaintiff must demonstrate:

- (1) that the defendant owed him a duty of care;
- (2) that the defendant's behaviour breached the standard of care;
- (3) that the plaintiff sustained damage; and
- (4) that the damage was caused, in fact and in law, by the defendant's breach.

[19] While BICL argues that the "true core" of the plaintiff's claim is a breach of the duty to warn, and that the particulars of the claim do not focus on a cause of action for negligent design or negligent manufacture, the plaintiff has pleaded all the necessary elements of a cause of action in negligence. That pleading, and common issues arising from it, should be permitted to stand.

### *Strict Liability*

[20] The plaintiff pleads that BICL is "strictly liable". Apart from a basket of allegations that are general to all the causes of action asserted, there are no specific pleadings of facts in support of that allegation.

[21] Strict liability is liability for unintended and non-negligent harm. The one area of Canadian tort law where it applies is in cases involving the rule in *Rylands v. Fletcher*, [1861-73] All E.R. Rep. 1, L.R. 3 H.L. 330, aff'd (1886), L.R. 1 Ex. 265. Apart from that, it is settled law that there is no strict liability in tort: *Anderson v. St Jude Medical Inc.*, [2002] O.J. No. 260 (S.C.J.) at paras. 27-40. The pleading of strict liability should therefore be struck.

### *Breach of Warranty – Sale of Goods Act*

[22] The plaintiff pleads that BICL is "liable for breach of express and/or implied warranty, including breach of warranty under various provincial Sale of Goods Act such as the *Sale of Goods Act*, R.S.O. 1990, c. S.1". He alleges that BICL warranted expressly or impliedly, through publications submitted to regulators, package inserts and other written materials provided to physicians, that the product was safe and effective.

[23] Mr. Farrer acknowledges that the absence of contractual privity between the buyer and the manufacturer is problematic for a claim based on breach of warranty. He submits, however, that in light of the regulatory regime over pharmaceuticals, the requirement of privity can be relaxed. There is no authority for this proposition and it is against the weight of authority:

*Wuttenee v. Merck Frosst Canada Ltd.*, 2007 SKQB 29, [2007] 4 W.W.R. 309, [2007] S.J. No. 7, at paras. 65 and 66, rev'd on other grounds 2009 SKCA 43, 69 C.P.C. (6th) 60, [2009] S.J. No. 179; *Singer v. Schering-Plough Canada Inc.* (2010), 87 C.P.C. (6th) 276, [2010] O.J. No. 113 at paras. 74-78 (S.C.J.); *Olsen v. Behr Process Corp.*, 2003 BCSC 429, [2003] B.C.J. No. 627 at paras. 19-26.

[24] The claim in breach of warranty and under the *Sale of Goods Act* should therefore be struck.

#### *Misrepresentation*

[25] The plaintiff pleads that BICL is liable for "negligent and/or fraudulent misrepresentation". He claims that BICL made "representations that Mirapex was safe and fit for its intended purpose and of merchantable quality when it knew or ought to have known that such representations were false" and that it misrepresented the state of medical knowledge concerning the risks of Mirapex including "compulsive and/or obsessive behaviour such as compulsive gambling."

[26] Counsel for the plaintiff acknowledged that no specific representation had been pleaded, but suggested that by putting the drug in the chain of commerce, BICL had represented that it was fit for its purpose.

[27] The decision of the Court of Appeal in *Lysko v. Braley* (2006), 79 O.R. (3d) 721, [2006] O.J. No. 1137 is one of the leading cases on the necessary ingredients of the cause of action for misrepresentation. The Court of Appeal stated at para. 30 that the pleading must set out, with "careful particularity": (a) the alleged misrepresentation itself; (b) when, where, how, by whom and to whom it was made; (c) its falsity; (d) the inducement; (e) the intention that the plaintiff should rely upon it; (f) the alteration by the plaintiff of his or her position relying on the misrepresentation; and (g) the resulting loss or damage to the plaintiff.

[28] The requirement that the plaintiff must have altered his or her position in reliance on the misrepresentation is an individual issue that has frequently made it difficult to certify a class action based on misrepresentation.

[29] The pleading in this case does not properly assert a cause of action in misrepresentation or in fraudulent misrepresentation. In particular, it does not plead any specific misrepresentation, nor does it plead that the plaintiff relied on the misrepresentation and changed his position as a result. The pleading should therefore be struck.

#### (b) Identifiable Class

[30] The plaintiff proposes the following class definition:

All persons resident in Canada (other than in Québec) who were prescribed and ingested the drug Mirapex® (generic name: Pramipexole dihydrochloride) in Canada which was manufactured, marketed, and/or sold or otherwise placed into the stream of

commerce in Canada by Boehringer Ingelheim (Canada) Ltd.,  
Boehringer Ingelheim Pharmaceuticals Inc. and/or Pfizer Inc.

[31] The plaintiff's factum says that the class is made up "primarily" of persons with PD but the plaintiff wishes to include persons with RLS in the class.

[32] In my view, the class definition should be restricted to persons who were prescribed Mirapex for the treatment of PD.

[33] There is no evidence before me to establish a relationship between the use of Mirapex for the treatment of RLS and the development of impulse control disorders. Dr. Napier's report, which was written in 2006, does not address the question of whether patients with RLS experience the same side effects from the use of Mirapex as patients with PD. The "Dominion Study", prepared on behalf of BICL, is directed solely at the experience with PD. The adverse effects referred to in the plaintiff's product monographs refer only to the use of the drug for the treatment of PD.

[34] The evidence of the defendant's expert, Dr. Weed, suggests (at p. 45) that PD and RLS are two very different diseases, with different diagnostic features and pathophysiology. In his opinion, they require separate analyses of the causal relation between Mirapex and pathological gambling. He says that while both PD and RLS patients respond to dopamine agonists, this is likely due to different pathologic mechanisms. He concludes, at page 46 of his report:

With these very prominent differences (between PD and RLS), it is clear that any assessment of the putative relationship between [pathological gambling] and Mirapex in RLS patients is a distinct problem from that in PD patients.

[35] In view of this evidence, and the lack of evidence of a relationship between Mirapex and impulse control disorders in persons treated for RLS, I do not propose to certify a class that includes persons prescribed Mirapex for the treatment of RLS. An amendment to the class definition and common issues may be considered at a future date, if there is supporting evidence.

[36] With this modification, and the removal of language which is unnecessary verbiage, the class definition meets the test of an appropriate class. Any class member can identify whether they are a member of the class and can decide whether they wish to participate in the action or to opt out. The class definition will therefore be:

All persons resident in Canada (other than in Québec) who were prescribed the drug Mirapex® (generic name: pramipexole dihydrochloride) for the treatment of Parkinson's Disease.

(c) Common Issues

1. *Basis in Fact*

[37] BICL submits that the plaintiff has failed to establish any basis in fact for:

- (a) common issues relating to impulse control disorders in persons prescribed Mirapex for the treatment of RLS; or
- (b) the inclusion of claims for impulse control disorders other than pathological (compulsive) gambling.

[38] For the reasons set out above, I have accepted the first submission. I do not accept the second.

[39] There is ample evidence, in BICL's own materials and studies, that Mirapex may be associated with compulsive gambling, hypersexuality, increased eating and compulsive shopping, all of which are impulse control disorders, a group of recognized psychiatric disorders. This evidence includes the product monograph dated June 4, 2010 and the "Dominion Study".<sup>4</sup> This conclusion is also supported by the expert evidence of the plaintiff's witness, Dr. Celeste Napier, an expert pharmacologist, who expressed the following opinion:

By the later 1990's, early 2000's, reports emerged that described Parkinson's Disease patients who develop features of addiction and pathological gambling and other compulsive behaviours during dopamine replacement therapy ... These patients showed an increasing need for dopaminergic treatments in excess of that normally required to relieve parkinsonian signs and symptoms. They presented behaviours typical of drug-dependence including drug seeking, drug hoarding, an unwillingness to reduce dopaminergic therapy and accelerated increases in the amount of dopamine treatment used. As predicted by laboratory studies on the brain's mesocorticolimbic dopamine system, dopaminergic therapies in these patients were associated with hypersexuality, pathological gambling and shopping, eating disorders and food craving. [Emphasis added.]

[40] I therefore find that there is a basis in fact for common issues pertaining to compulsive gambling, hypersexuality, binge eating and compulsive shopping.

#### *Proposed Common Issues*

[41] The common issues set out in the factum of counsel for the plaintiff are listed in Schedule A to these reasons. As is often the case, they have undergone some modification from the common issues originally proposed in the notice of motion, some of the changes being due to efforts to address concerns raised by the defendant.

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<sup>4</sup> A Cross-Sectional Retrospective Screening and Case-Control Study Examining the Frequency of, and Risk Factors Associated with, Impulse Control Disorders in Parkinson's Disease Patients Treated with MIRAPEX® (Pramipexole) and Other Anti-Parkinson Agents.

### Causation and Negligence

[42] The plaintiff and the defendant have each posed slightly different forms of a question directed to causation.

[43] The plaintiff proposes:

Is there an increased risk of impulse control disorders (compulsive behaviours) from the ordinary use of Mirapex®?

[44] The defendant proposes:

Has it been established that the ordinary use of Mirapex® causes Pathological (Compulsive) Gambling in patients diagnosed with PD?

[45] The plaintiff notes that a common issue similar to the one he proposes was certified by Perell J. in *Goodridge v. Pfizer Canada Inc.*, 2010 ONSC 1095, 101 O.R. (3d) 202.,<sup>5</sup>

[46] In this case, it seems to me that the most helpful common issue, with respect to common issues arising out of the negligence pleading, could be re-framed as follows:

In these common issues, "Impulse Control Disorder" means any of the following conditions in patients prescribed Mirapex for the treatment of Parkinson's Disease: hypersexuality, pathological gambling, binge eating and compulsive shopping.

(a) Does the ordinary use of Mirapex, in prescribed dosages, cause Impulse Control Disorders?

[47] This is an issue of general causation, as distinct from the question of whether Mirapex caused a specific impulse control disorder in a specific patient.

[48] I will certify the plaintiff's common issues (b) and (c) relating to negligence, slightly modified as follows:

(b) If the answer to question (a) is "yes", is Mirapex defective or unfit for the purpose for which it was intended, including usages that ought reasonably to have been foreseen by the Defendant?

(c) If the answer to (a) is "yes", did the Defendant breach a duty of care owed to the Class by marketing, selling and/or distributing Mirapex in Canada?

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<sup>5</sup> The common issue in that case was: "Can ingesting Neurontin cause an increased risk of suicidal behaviour?"

[49] Similar common issues were certified in *Goodridge v. Pfizer Canada Inc.* above.

#### Duty to Warn

[50] The defendant agrees that there should be common issues with respect to the duty to warn. Each party has proposed slightly different common issues. I would modify them slightly as follows:

(d) Are Impulse Control Disorders an inherent risk of the ordinary use of Mirapex?

(e) If the answer to question (d) is "yes", when did BICL know, or when ought it to have known of that risk?

(f) If the answer to question (d) is "yes", did BICL breach a duty to warn users of Mirapex or their physicians of that risk by failing to make reasonable efforts to provide them with reasonable information concerning that risk?

(g) If the answer to question (f) is "yes", how long did that breach continue?

[51] In conceding that it is appropriate to have a "duty to warn" common issue, BICL specifically reserves its right to rely on the "learned intermediary" doctrine: see, for example, *Hollis v. Dow Corning Corp.*, above.

#### Damages

[52] The plaintiff's proposed common issue asks:

Is the defendant liable for damages, including subrogated health care costs, resulting from the use of Mirapex, and if so, in what amounts.

[53] Damages are clearly individual issues. It is possible that some aspects of the liability for the costs incurred by subrogated insurers could be addressed as a common issue, but I do not think it is appropriate to address it as a common issue at this time.

#### Behaviour Monitoring

[54] This proposed common issue asks:

Should the Defendant be required to implement a behavior monitoring regime and, if so, what should that regime comprise and how should it be established?

[55] This common issue appears to spring out of nowhere. There is no evidence before me as to what "behaviour monitoring" would be, why it is necessary, how it would benefit the class or

why the defendants should be required to do it. Presumably if class members are found to have one of the four impulse control disorders, they can be awarded damages to compensate them for the past consequences of the injury as well as any proven anticipated future costs. It would appear that in Mr. Schick's case at least, as pleaded, his compulsive gambling stopped when he ceased taking Mirapex and changed to a different medication.

[56] This is not a case, like *Andersen v. St. Jude Medical Inc.*, above, where it is alleged that a defective medical device has been implanted and the class members require additional or different medical monitoring.

[57] In the absence of any basis in fact for this common issue, I would not certify it.

#### Punitive damages

[58] The plaintiff proposes:

Does the conduct of the Defendant justify an award of punitive damages?

[59] BICL submits that punitive damages is not an appropriate common issue. It points in particular to the judgment of Binnie J. in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19 at para. 94, where he stated that an award of punitive damages requires consideration of a number of factors, only one of which is the defendant's conduct. Binnie J. stated that the court must consider whether the defendant has engaged in

high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.

[60] In addition to this factor, however, a court is required to consider, among other things, the harm caused by the conduct and whether compensatory damages are insufficient to achieve the goals of retribution, deterrence and denunciation.

[61] It was for these reasons that Perell J. concluded in *Robinson v. Medtronic Inc.* (2009), 80 C.P.C. (6<sup>th</sup>) 87, [2009] O.J. No. 4366 aff'd 2010 ONSC 3777, [2010] O.J. No. 3056 (Div. Ct.), that the entitlement to punitive damages was not a suitable common issue. In that case, as in this case, the extent of harm, if any, caused by the defendant's conduct will not be known until the individual issues have been resolved.

[62] On the other hand, in *Anderson v. St. Jude Medical Inc.*, above, Cullity J. certified a common issue asking:

Does the defendants' conduct merit an award of punitive damages, and if so, in what amount?

[63] A question of this kind would permit the court to make a finding based solely on the defendant's conduct, in order to determine whether an award of punitive damages would be appropriate if the other conditions identified by Binnie J. in *Whiten* were present.

[64] In this case, I have concluded that it would be appropriate to certify a focused common issue of this kind, which can conveniently and efficiently be considered in connection with the negligence common issue, which will necessarily focus on the state of medical knowledge and of BICL's knowledge and what it did, or failed to do, in the circumstances. I therefore approve the plaintiff's proposed common issue.

[65] The application of the other *Whiten* factors, and the quantification of punitive damages, will be addressed after the common issues trial and after the determination of compensatory damages.

#### Waiver of Tort

[66] The waiver of tort doctrine gives a plaintiff the right to elect between compensatory tort damages and a restitutionary remedy of disgorgement.

[67] Numerous class proceedings have been certified in Ontario based on the issue of waiver of tort: *Heward v. Eli Lilly & Co.*, above; *Peter v Medtronic Inc.* (2007), 50 C.P.C. (6<sup>th</sup>) 133, [2007] O.J. No. 4828 (S.C.J.) leave to appeal to Div. Ct. refused (2008), 55 C.P.C. (6<sup>th</sup>) 242, [2008] O.J. No. 1916 (Div. Ct.); *Tiboni v Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4<sup>th</sup>) 32, [2008] O.J. No. 2996 (S.C.J.), *sub. nom Mignacc v. Merck Frosst Canada Ltd.*, leave to appeal to Div. Ct. refused (2008), 304 D.L.R. (4<sup>th</sup>) 220, [2008] O.J. No. 4731 and [2009] O.J. No. 5233 (S.C.J.); *Serhan v. Johnson and Johnson* (2004), 72 O.R. (3d) 296, [2004] O.J. No. 2904 (S.C.J.) *aff'd* (2006), 85 O.R. (3d) 665, [2006] O.J. No. 2421, leave to appeal to the Court of Appeal was refused on October 16, 2006 and leave to appeal to the SCC was refused April 12, 2007, 234 O.A.C. 398.

[68] The parties have proposed slightly different common issues with respect to waiver of tort. The plaintiff's proposal is set out in Schedule A, but for the sake of comparison is as follows:

(g) By virtue of waiver of tort, is the defendant liable on a restitutionary basis:

- i. to account to any of the Class, including the provincial insurers with subrogated claims, on a restitutionary basis for any part of the proceeds of the sale of Mirapex? or in the alternative; and/or
- ii. such that a constructive trust is to be imposed on the proceeds of the sale of Mirapex for the benefit of the Class, including provincial health insurers with subrogated claims?

(h) If either part of question (g) is answered in the affirmative, in what amount and for whose benefit is such an accounting or disgorgement to be made?

[69] The plaintiff proposes that common issue (h), relating to the quantification of the claim for an accounting and disgorgement, should be bifurcated and dealt with only after the common issues trial, if required. He says that this will avoid discovery on the financial issues and will save time.

[70] BICL's proposed common issue is as follows:

By virtue of the doctrine of waiver of tort, can all or part of the Class elect to receive, in lieu of any recoverable damages, an accounting or disgorgement of any part of the proceeds of the sale in Canada of Mirapex that was prescribed to and ingested by Class members?

[71] The second question proposed by BICL, relating to the amount of the disgorgement and the parties entitled to benefit from it, is substantially the same as the plaintiff's issue (h).

[72] BICL agrees with the plaintiff's proposal that issue (h), dealing with quantum, should be bifurcated, relying on the decision of the Divisional Court in *Robinson v. Medtronic Inc.*, above. In my view, this is an appropriate course of action.

[73] I will approve the common issues in the form proposed by the plaintiff, with the qualification that issue (h) will not be addressed until after the trial of the common issues.

(d) Preferable Procedure

[74] A class action is well-suited to the resolution of products liability cases and a number of drug cases have been certified – see: *Wilson v. Servier Canada Inc.* (2001), 11 C.P.C. (5<sup>th</sup>) 374, [2001] O.J. No. 1615 (S.C.J.); *Tiboni v. Merck Frost Canada Ltd.*, above; *Boulanger v. Johnson & Johnson Corp.* (2007), 40 C.P.C. (6<sup>th</sup>) 170, [2007] O.J. No. 179 (S.C.J.), leave to appeal to Div. Ct. refused [2007] O.J. No. 1991 (S.C.J.); *Heward v. Eli Lilly & Co.*, above.

[75] There is no dispute that a class proceeding is the preferable procedure for the resolution of the common issues and that it will promote the goals of the *C.P.A.*

[76] In this case, a class action will facilitate the important goal of *access to justice* by enabling class members, who are vulnerable due to their medical conditions, to undertake litigation that would be daunting on an individual basis. It will achieve *judicial economy* through common resolution of factual and legal issues, thereby avoiding duplication of fact-finding and legal analysis. It will, if successful, bring about *behaviour modification* by ensuring that the risks of medications are properly disclosed to consumers and that appropriate precautions are taken in the manufacturing and marketing of drugs.

(e) Representative Plaintiff

[77] Counsel for the defendant has, in his factum, raised questions about whether Mr. Schick is able to discharge his responsibilities as a representative plaintiff and whether another, or an additional, representative plaintiff should be appointed. He has noted that Mr. Schick himself has not sworn an affidavit in support of the motion and raises the question of whether Mr. Schick's

PD will make it difficult to participate in the necessary steps in the proceeding, such as discovery. These concerns were adopted, but not expanded upon, during argument.

[78] I am satisfied from the affidavit filed by class counsel that Mr. Schick is an appropriate representative plaintiff who understands his responsibilities, has no conflict with other class members on the common issues and is willing and able to fairly and adequately represent the class. Any concerns arising from his condition can be dealt with in a way that is fair to the class and to the defendant. He is represented by experienced and capable counsel who will ensure that he is fully engaged as the litigation proceeds and that if circumstances change, they will be brought to the attention of the case management judge.

[79] The defendant objects that the litigation plan fails to identify the individual issues that will remain after the trial of the common issues, and creates the misleading impression for class members that they will proceed directly from the common issues trial to the assessment of damages. In fact, says BICL, there will be individual issues of:

- causation (did Mirapex cause an Impulse Control Disorder in this particular class member?);
- voluntariness or personal responsibility (did the particular class member voluntarily engage in the conduct in question?);
- contributory negligence (was the person's loss contributed to by his or her own personal negligence?);
- limitation periods; and
- damages.

[80] BICL says that by failing to address these and other individual issues, the litigation plan does not give class members a realistic picture of what is in store for them and does not allow them to make an informed decision about whether to opt out of the class.

[81] In this case, BICL has fairly and appropriately acknowledged that a class action is the preferable procedure for the resolution of the common issues. It does not claim, as is so often claimed by defendants, that the nature and extent of the individual issues make a class action "unworkable". It is less important, therefore, for the plaintiff to establish that he has proposed a "workable" litigation plan for the resolution of the common and individual issues. Moreover, the nature and extent of the individual issues remaining after the common issues trial is likely to depend, in large measure, on the findings made at the common issues trial. The resolution of the common issues may help to define what individual issues remain and how they can be most economically, expeditiously and fairly addressed. A litigation plan drafted today may be nothing more than a back of the envelope sketch that will bear little resemblance to the final working drawing.

[82] All that said, counsel for BICL makes a fair point when he says that the litigation plan should at least recognize the existence of potential individual issues and should indicate, at least

in a preliminary way, how the plaintiff proposes to address them. To that extent, I agree that the litigation plan requires some amendment.

### Conclusion

[83] Subject to the amendment of the litigation plan, an order will issue certifying this action as a class proceeding. The plaintiff should prepare a draft order in accordance with s. 8 of the *C.P.A.* and submit it to the defendant for review. The order will be settled, a revised litigation plan will be reviewed and notice of certification will be discussed, at a case conference. Costs, if not resolved, may be addressed by written submissions.

[84] The brevity of these reasons does not, perhaps, adequately reflect the work that the parties put into this motion. The plaintiff's record was two volumes. The defendant's record was four volumes. There were four volumes of authorities. The plaintiff's factum was 50 pages and the defendant's was 74 pages. Counsel took the commendable approach of finding agreement on issues that were capable of resolution and vigorously contesting those that were not. This resulted in an efficient and focussed hearing in which the contentious matters were thoroughly discussed. I express my thanks to all counsel for their assistance.



G.R. Strathy J.

Date: March 28 2011

