
CANADA / JUDGMENT

Bartram v. GlaxoKlineSmith Inc.

2016 BCSC 1409

COURT

Supreme Court of British Columbia

DECIDED

28 July 2016

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2016 BCSC 1409 Bartram v. GlaxoSmithKline Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bartram v. GlaxoSmithKline Inc.,

2016 BCSC 1409

Date: 20160728

Docket: S081441

Registry: Vancouver

Between:

Meah Bartram, an 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 Smith

Reasons for Judgment

re Jury Strike Application

Counsel for the Plaintiffs:

D. Rosenberg, Q.C.

D. Moriarty

Counsel for the Defendants:

R. Sutton

S. Chesworth

J. Preece

Place and Date of Hearing:

Vancouver, B.C.

July 6 and 7, 2016

Place and Date of Judgment:

Vancouver, B.C.

July 28, 2016

- [1] The defendants in this class action apply under R. 12-6(5) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, for an order striking a jury notice and requiring that an upcoming trial of common issues be heard by judge alone.
- [2] The plaintiffs allege that newborn infants suffered cardiovascular birth defects as a result of their mothers' use of the anti-depressant drug Paxil during pregnancy. The defendant, GlaxoSmithKline Inc. ("GSK"), markets the drug in Canada, having obtained the necessary regulatory approval from Health Canada. A trial of common issues is set to begin on October 3, 2016, and to last 40 days. The plaintiffs have served a notice under R. 12-6(3) requiring trial by jury.
- [3] An order made on December 3, 2012, defines the class as:
- any person in Canada, born with cardiovascular defects, to women who ingested Paxil while pregnant, and the mothers of those persons.
- [4] That order also established the common issues that are to go to trial:
8. The certified common issues pertaining to the Class are as follows:
- a. Does Paxil cause or increase the likelihood of cardiovascular birth defects?
 - b. Is Paxil unfit for use during pregnancy?
 - c. Did the Defendant GlaxoSmithKline Inc. fail to warn Class members and/or Health Canada of the true risk of cardiovascular 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 the Defendant GlaxoSmithKline Inc. warrant an award of punitive damages, and if so, what amount of punitive damages should be awarded?
- 9. The certified common issues pertaining only to those Class members resident in British Columbia are:
 - a. Did the Defendant GlaxoSmithKline Inc.'s solicitations, offers, advertisements, promotions, sales and supply of Paxil in British Columbia, for personal use by Class members fall within the meaning of "consumer transactions" in the BPCPA [the Business Practices and Consumer Protection Act, SBC 2004, c. 2]?
 - b. With respect to the sales in British Columbia of Paxil to Class members for their personal use, was the Defendant, GlaxoSmikthKline Inc. a "supplier" as defined in the BPCPA?
 - c. Are the Class members "consumers" as defined by the BPCPA?
 - d. 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?
 - e. 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?
- [5] In arguing whether the matter is suitable for a jury trial, counsel focused on the common issues applicable to the entire class. Nothing was said of the issues applicable only to British Columbia class members, but I note that, even in a jury trial, at least the first three of them may still be matters of law for the trial judge.
- [6] Rules 12-6(3) and (5)(a) read:

Notice requiring jury trial

- (3) Subject to Rule 15-1 (10) and subrules (2) and (4) of this rule, a party may require that the trial of an action be heard by the court with a jury by doing the following:
 - (a) within 21 days after service of the notice of trial but at least 45 days before trial,
 - (i) filing a notice in Form 47, and
 - (ii) serving a copy of the filed notice on all parties of record;
 - (b) at least 45 days before trial, paying to the sheriff a sum sufficient to pay for the jury and the jury process.

Court may refuse jury trial

- (5) Except in cases of defamation, false imprisonment and malicious prosecution, a party on whom a notice under subrule (3) has been served may apply
 - (a) within 7 days after service for an order that the trial or part of it be heard by the court without a jury on the ground that
 - (i) the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury,
 - (ii) the issues are of an intricate or complex character, or
 - (iii) the extra time and cost involved in requiring that the trial be heard by the court with a jury would be disproportionate to the amount involved in the action

(Although Rule 12-6(5)(a) requires an application to be made within 7 days of the notice being served, a sensible practice has developed under which the application is not actually argued until much closer to trial, when the issues have been more clearly defined. In this case, the notice requiring a jury trial and the application to strike were served in September, 2014.)

- [7] The effect of those Rules is to create a presumptive right to a civil jury trial and to place an onus that is "not easily satisfied" on a party seeking to strike a jury notice: *MacPherson v. Czaban*, 2002 BCCA 518 at para. 17.
- [8] The word "conveniently" in R. 12-6(5)(a)(i), refers to the proper conduct and management of a trial, including the process by which a decision is reached: *Wipfli v. Britten* (1981), 32 B.C.L.R. 343 at pp. 348-49 (S.C.); *Harder v. Nikolov*, 2001 BCSC 1101 at para 19. In *Wipfli*, McEachern C.J.S.C. (as he then was), said the focus must be not only on a jury's ability to understand scientific evidence, but also on its ability to retain that understanding through a long trial in a way that permits an analysis of the evidence.
- [9] *Wipfli*, on which defendants heavily rely, was a case of alleged medical negligence during the birth of the infant plaintiff. The trial was expected to last 25 days. McEachern C.J.S.C. said at 349:

I do not believe that it will be convenient to make this scientific investigation with a jury. If the trial proceeds with a jury, and if it should last 25 days or thereabouts, the members of the jury whose note-taking ability is at least questionable will listen, usually in silence, to many days of scientific evidence about the matters mentioned above. They will then hear submissions pro and con which will compress this case the way counsel choose to compress it but not, perhaps, the way the jury would like to have it discussed. The jury will have practically no opportunity (except possibly for a few hesitant questions), to take part in the trial, and the jury will have no verbal interaction or opportunity to discuss this case with the witnesses or with counsel, as a judge has. The jury will then hear the judge's best efforts to analyze and simplify the case, but it is doubtful if the case can properly be explained in a protracted monologue, keeping in mind that I have mentioned only some of the issues in the case.

After that, the jury will be instructed to retire and decide the case, and they will be separated from mankind, except for meals or when exhaustion arrives, until they reach a unanimous verdict. If, after three hours, they have not reached a verdict, they may be told that a majority verdict of three-quarters of their number will be accepted.

- [10] While the basic principles referred to in *Wipfli* remain binding, their application to the facts of a given case must be considered in context. In the 35 years since *Wipfli* was decided, almost all trials (including serious criminal trials, where the right to a jury trial is constitutionally guaranteed) have become longer and more complex. There has been a proliferation of expert evidence, both in the number of experts and in the areas in which opinion is tendered.
- [11] Nevertheless, the right to a civil jury trial has remained part of the Rules, and the court has repeatedly acknowledged both the intelligence of contemporary juries and their ability to assess properly presented expert evidence: *MacKinnon v. Ebner*, [1997] B.C.J. No. 364 at para. 26 (S.C.); *Cliff v. Dahl*, 2012 BCSC 276 at para. 28.
- [12] Nothing in the Class Proceedings Act, R.S.B.C. 1996, c. 50, precludes a trial by jury, although the nature of a class action may introduce additional considerations. In *Collette v. Cartier Partners Securities Inc.*, 2005 BCSC 501, Macaulay J. said at para. 47:
- [47] At the end, I am persuaded that the test for striking a jury notice and requiring that a class proceeding be heard by a judge without a jury can be addressed on the existing case law relating to the applicable Rules of Court, subject to the added considerations that underpin all procedural steps in a class proceeding, namely that they mode of conduct of the proceeding ensure the fair and expeditious determination of the issues.
- [13] The defendants argue that the common issues trial will involve voluminous and complex scientific evidence from a variety of disciplines. The court will not only have to consider a combination and interplay of medical, scientific, and regulatory issues but will have to consider where an evolving state of scientific knowledge stood at various points over a 20-year period.
- [14] The defendants say they have produced more than 200,000 pages of documents, many of which will be in evidence at trial. These documents are said to include:
- a) an initial New Drug submission to Health Canada of more than 90,000 pages and 39 supplemental submissions totaling more than 70,000 pages;
 - b) periodic safety update reports containing data collected worldwide, totaling more than 28,000 pages; and
 - c) more than 400 relevant scientific and other journal articles.

- [15] Areas of expert medical evidence at trial, according to the defendants, will likely include birth defects epidemiology, developmental cardiology, reproductive toxicology and teratology, obstetrics, gynecology, and reproductive psychiatry. In addition, they say expert evidence will be necessary on the Canadian regulatory process for approval of new drugs.
- [16] The plaintiffs say that the matter is not as complicated as the defendants suggest. They note that, beginning in 2006, GSK's published monograph for Paxil referred to epidemiological studies that reported an increased risk of cardiovascular defects in newborns. That document suggests that, for women who intend to become pregnant or are in the first trimester of pregnancy, paroxetine (the technical name for Paxil) "should be considered only after other treatment options have been evaluated."
- [17] The defendants deny that statement constitutes an admission that Paxil causes birth defects, while the plaintiffs contend even that notice is inadequate. However, the plaintiffs say the primary issue at trial will be the relatively straightforward factual question of if and when GSK knew or should have known of a risk about which it needed to warn.
- [18] This application was argued shortly before the date on which the parties were required to exchange the expert reports they will be relying upon at trial, and none of those reports were put before me. Therefore, I do not know the extent to which any of the areas of expertise referred to by the defendant will actually be put in issue or how effective the experts will be in explaining them.
- [19] Nothing in the Rules or the case law prevents an application of this kind being argued before expert reports have been exchanged. However, in the absence of that evidence, the question of how complex a trial will be is inevitably somewhat speculative and hypothetical, which may make it more difficult for an applicant to meet the onus of proof.
- [20] The defendants relied on medical opinions that were put forward on the certification application, including a report from Dr. Edward Lammer, dated January 9, 2012. Dr. Lammer refers to the complexity of the causation analyses that will be necessary.

Because birth defects, including cardiovascular defects, can be caused by any number of known and unknown genetic and environmental factors, it is impossible to identify the true cause, or even the most likely cause, of any particular child's defect without considering potential genetic etiologies and other potentially relevant gestational exposures, including maternal diseases and illnesses during the relevant window of susceptibility. The identification of the cause of any particular child's defect necessarily requires a case-by-case evaluation.

- [21] Many of the complications noted by Dr. Lammer will be more relevant to the individual claims than to the trial of common issues. A finding that common issues are appropriate for trial by jury does not preclude a contrary finding in relation to subsequent trials of individual claims: Collette at para. 43.

- [22] A finding by either a jury or judge alone on the trial of common issues that Paxil causes or increases the likelihood of cardiovascular birth defects will not necessarily be a conclusive answer to the question of whether the specific birth defect suffered by an individual infant plaintiff was caused or contributed to by Paxil. Nor will it answer the difficult question of whether an individual mother, advised of a certain level of risk, would have declined to take a drug that had presumably been prescribed for a significant medical condition. If this case proceeds to trials of individual issues, those trials may or may not be suitable to be heard by juries.
- [23] The defendant points to the thousands of documents and scientific studies that must be analyzed, but the reality is that a judge sitting alone is no more likely than a jury to read all of that material and come to a conclusion unaided (I say that with some confidence, being the assigned trial judge). It will be the job of counsel to identify what is most relevant and the job of the expert witnesses to synthesize and explain that material. As MacKenzie J. said in MacKinnon at para. 24:
- [24] A reasonably informed and intelligent jury is as capable of assessing expert evidence as is a single judge. It is up to counsel to ensure it is presented so that a jury can understand it. Indeed, the very purpose of expert evidence is to assist lay people to understand technical evidence. After all, a judge is not an expert in such matters and would experience the same difficulties .
- [24] Similarly, Bruce J. said in Cliff at para. 42:
- [42] It is not sufficient for the applicant to list expert reports and assert that these will require the jury to spend prolonged periods of time studying them. As the authorities cited by Mr. Cliff and Ms. Dahl indicate, the raw data and background materials underlying expert opinion evidence are often not presented to the jury. This evidence is culled and simplified for the trier of fact regardless of whether it is a trial by judge alone or judge and jury. The onus is on the applicant to demonstrate why, in the circumstances of this case, the jury will be required to spend prolonged periods of time examining the raw data in support of the various expert opinions. Further, the onus rests with the applicant to demonstrate, if there will be a need for prolonged examination of documentary evidence, that it is inconvenient for the jury to do so in this particular case. As the court said in Gulamani, the mere fact that there will be a need for a prolonged examination of documents does not automatically lead to a conclusion that it will be "inconvenient" for a jury to do so. The question is whether a jury can be made to understand the evidence and to retain this understanding until the end of the trial .
- [25] I do not want to understate or minimize the complexity of the scientific issues underlying this case, but at the most basic level, the plaintiffs will need to present expert evidence that Paxil causes or increases the likelihood of at least some cardiovascular birth defects. Those experts will have to explain the basis for their conclusion in terms that a layperson--whether a judge or a juror--is capable of understanding and analyzing. Those or other experts will also have to have reviewed the scientific literature over the relevant period and indicate

when, in their opinion, any risk or danger had been identified.

- [26] To the extent the plaintiffs present that evidence, the defendants will presumably put forward contrary expert opinion. In weighing such conflicting opinions, the trier of fact will be assisted by counsel's cross-examinations of experts and their submissions.
- [27] While the subject matter of this case is unique, the process of hearing and analyzing expert evidence will not necessarily be different from what juries do in a variety of other cases involving sometimes complex personal injuries. It may even be more straightforward because, as said above, the jury in a common issues trial will not have to consider other possible causes of injury that may be relevant to an individual plaintiff.
- [28] One obvious problem is the 40-day time estimate for the common issues trial. I expect there will be many members of a jury panel whose personal circumstances will prevent them from serving on a jury for that length of time. However, that is a matter to be dealt with at jury selection.
- [29] In the result, and in the absence of any opportunity to consider the expert evidence that will actually be before the court, I am not persuaded that the jury notice should be struck. The issue may be revisited if, during the course of trial, it appears that the matter is, in fact, too intricate or complicated to be conveniently tried with a jury: Cliff at para. 43.
- [30] The defendants' application is dismissed.

"N. Smith J."

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