
CANADA / JUDGMENT

Nogueira v. O. Alasaly Pharmacy Ltd.

2014 BCSC 1237

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1237 Nogueira v. O. Alasaly Pharmacy Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nogueira v. O. Alasaly Pharmacy Ltd.,

2014 BCSC 1237

Date: 20140704

Docket: 13-0894

Registry: Victoria

Between:

Noelle Dionne Nogueira

Plaintiff

And

O. Alasaly Pharmacy Ltd.,

Sanofi Consumer Health Inc. and Sanofi Sante Grand Public Inc.

Defendants

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for Plaintiff:

K. Hauer

Counsel for the Defendants:

C. Elrick

Place and Date of Trial:

Victoria, B.C.

June 3-4, 2014

Place and Date of Judgment:

Victoria, B.C.

July 4, 2014

I. Introduction

- [1] On the evening of November 11, 2011, the plaintiff was experiencing muscle soreness in her left thigh. Hoping to soothe the pain, she bought a medicated analgesic patch from the defendant pharmacy and placed it on the affected area.
- [2] As a result of applying the medicated patch, the plaintiff suffered a significant burn to her skin which subsequently required surgery under general anesthetic. Other skin from the plaintiff's thigh was used for a skin graft.
- [3] During trial, the plaintiff abandoned her claim against the defendants Sanofi Consumer Health Inc. and Sanofi Sante Grand Public Inc., leaving the defendant pharmacy as the sole defendant.
- [4] The plaintiff seeks general damages of \$40,000 to \$65,000 and \$4,446.47 under the Health Care Costs Recovery Act, S.B.C. 2008, c. 27, plus costs. No wage loss or other damages are claimed.
- [5] For the reasons that follow, the Court will award the plaintiff \$25,000 in general damages and the \$4,446.47 health care costs recovery amount.

II. Background facts

- [6] The plaintiff is 42 years old. She has four children ages 23, 21, 18 and 11. She is in the process of becoming a foster mother for a 13-year-old. She is separated from her husband.
- [7] When the plaintiff bought the medicated patch, she was working as the night-time janitor for a local car dealership.
- [8] On the evening of November 11, 2011, around 11:00 p.m., the plaintiff left work during one of her breaks to go to the defendant pharmacy to purchase an over-the-counter product to treat her sore thigh muscle. She bought a box of medicated analgesic patches. She read the instructions on the box. There was no warning with respect to burns or the risk of burns. The box has a description of a cooling and heating therapy for muscle pain.

- [9] She returned to work and applied the patch. There was no evidence or suggestion at trial that the plaintiff's thigh's skin had a rash, a sunburn, or other damage or wound before she applied the patch.
- [10] The plaintiff kept the patch on her thigh for some time but then removed it because it felt like her skin was burning. When she removed the patch, affected skin came off with the patch. It was "all gooey" and "extremely painful". She dabbed at the surrounding area but not the burn itself with cool water, and continued working.
- [11] After work, she either went home to attend to her children and then went to her family physician, or she went directly to her family physician. Defence counsel pointed to the plaintiff's equivocal testimony on this point as well as her inability to recall how long the patch was on her leg to argue that the plaintiff was an unreliable witness. During her testimony the plaintiff was emotionally fragile when she discussed the damage to her skin.
- [12] The Court finds that the plaintiff did not have the patch on her leg for more than two hours. At trial, she testified in chief that the patch was on for less than an hour and in cross-examination she could not remember exactly how long it was on her thigh, but it was "not very long". The plaintiff's family physician's November 12, 2011 notes refer to the plaintiff's description that "w/i 2 hours had skin stinging". The plaintiff's surgeon's December 12, 2011 notes refer to the plaintiff's description that she "had patch on for about 48 minutes".
- [13] While the plaintiff was not reliable with respect to the exact details, the Court finds she did not leave the patch on her thigh longer than a reasonable length of time, and certainly not more than logic would dictate. When it became apparent to the plaintiff that something was wrong, she removed the patch.
- [14] The fact that the plaintiff may have first gone home from work to attend to her children prior to seeking medical treatment was reasonable. Many parents will attend to their children before caring for themselves. The plaintiff sought medical attention within hours of leaving work.
- [15] The plaintiff's family physician treated the wound as a burn and applied a dressing.
- [16] In the late evening of November 12, 2011, the plaintiff was in significant pain and went to the emergency room of her local hospital for further treatment. She was treated with burn cream and further dressings were applied to the wound.
- [17] On December 13, 2011, Dr. Naysmith, a plastic surgeon with Royal Jubilee Hospital, operated on the burn area using a skin graft technique. Dr. Naysmith excised the burn, harvested the skin to be grafted, grafted the skin, dressed the donor and burn sites, and stapled burn gauze into position.
- [18] The plaintiff testified that during the month before surgery she had the wound dressing changed every day. During that period she was "very uncomfortable" when she drove or sat.

- [19] The plaintiff testified that the wound took "a good month" to heal from the surgery. She says she still experiences tingling in the burn area. The burn does not affect her mobility.
- [20] On December 4, 2014, Dr. D. Classen, a plastic surgeon, conducted an independent medical examination and prepared a report in contemplation of trial. The plaintiff entered Dr. Classen's report, dated March 6, 2014, into evidence. In his report, Dr. Classen describes the plaintiff's wound following surgery:

Examination of the left thigh demonstrates a residual scar on the left anterior mid-thigh, 17 centimeters above the knee. The scar is 7 centimetres in vertical length by 4 centimeters in width. It is mildly noticeable, as it is hypopigmented compared to the surrounding skin. It has a slight meshed type appearance to the scar. The contour is depressed by approximately 1 millimeter compared to the surrounding skin. I could palpate the area with complaint of some mild discomfort and a feeling of numbness described. The skin graft scar is providing durable skin coverage. There is no skin breakdown or ulcerations present. The split thickness skin graft donor site scar is adjacent to this skin graft scar. The donor site is barely noticeable, there is no contour abnormality. There is no significant skin discoloration. It is virtually similar to the surrounding skin appearance.

- [21] Dr. Classen did not testify. He was not asked to provide an opinion as to whether the plaintiff's skin was particularly sensitive or was in any way abnormal such that a medicated patch would burn her skin. This possibility was not suggested in the cross-examination of the plaintiff.
- [22] The plaintiff describes the sight of her thigh now as "disgusting", "ugly", "a big splotch", and feels it is "degrading". She does not wear many types of clothes she used to wear.
- [23] From the plaintiff's presence in the witness box, it was readily apparent to the Court that the plaintiff believed her description of the affected area and was not trying to exaggerate or mislead the Court.
- [24] Photographs of the thigh taken November 13, 15 and 29, 2011 show the extent of the wound prior to the December 12, 2011 surgery. Photographs taken December 22, 2011 show the graft and the mesh ten days after the surgery. Both of these sets of photographs are helpful; however, the further photograph taken in November 2013, showing the thigh's current appearance, is not particularly helpful to the Court because of poor lighting exposure. Certainly there is a significant mesh-like scar area with enlarged veins in the immediate area. The plaintiff says the enlarged veins are related to the surgery. The plaintiff's view that the enlarged veins are a recent development is consistent with the photographs taken before the operation, although the photographs taken December 22, 2011, ten days after the surgery, also do not show enlarged veins.
- [25] In examination in chief the plaintiff testified that she suffers from both myofascial and neuromuscular disorders. The Court does not have sufficient evidence to find that the enlarged veins are related to the burn and the related surgery.

- [26] Mr. S. Langevin testified for the defence. He is the senior director of marketing of Sanofi-Aventis Canada Inc. He is responsible for the marketing in Canada of the particular brand of medicated patches and for ensuring compliance with the applicable rules and regulations as they relate to Health Canada.
- [27] The medicated patches are manufactured in Japan and distributed in Canada by Sanofi Consumer Health Canada Inc.
- [28] The product license issued by the Ministry of Health shows the medicated patches have been approved for sale over-the-counter. Mr. Langevin testified that Health Canada has never requested that the medicated patches be recalled or that the packaging (labelling) be modified.
- [29] Mr. Langevin testified that all batches of medicated patches are tested before they are released for sale by Sanofi Consumer Health Canada Inc. He further testified that, since the product licence was granted in 2007, approximately 3,000,000 patches have been sold in Canada. He testified that the only burn complaint received by his employer or related corporations was from the plaintiff.

III. Analysis

- [30] Where certain requirements are met, sections 18(a) and (b) of the Sale of Goods Act, R.S.B.C. 1996, c. 410, will imply contractual conditions. Section 18(a) will imply the condition that the goods are reasonably fit for the purposes for which they are supplied. Section 18(b) will imply the condition that the goods are of merchantable quality.

- [31] Sections 18(a) and (b) represent exceptions to the general rule of caveat emptor.

- [32] Sections 18(a) and (b) read:

18 Subject to this and any other Act, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale or lease, except as follows:

- (a) if the buyer or lessee, expressly or by implication, makes known to the seller or lessor the particular purpose for which the goods are required, so as to show that the buyer or lessee relies on the seller's or lessor's skill or judgment, and the goods are of a description that it is in the course of the seller's or lessor's business to supply, whether the seller or lessor is the manufacturer or not, there is an implied condition that the goods are reasonably fit for that purpose; except that in the case of a contract for the sale or lease of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

(b) if goods are bought by description from a seller or lessor who deals in goods of that description, whether the seller or lessor is the manufacturer or not, there is an implied condition that the goods are of merchantable quality; but if the buyer or lessee has examined the goods there is no implied condition as regards defects that the examination ought to have revealed;

[33] In *Grant v. Australian Knitting Mills Limited*, [1936] A.C. 85, the Judicial Committee of the Privy Council considered Australian legislation similar to section 18(a) and (b). In *Grant*, the plaintiff contracted dermatitis as a result of wearing a woollen garment purchased from the defendant retailer, sold under the manufacturer's make known as Golden Fleece.

[34] With respect to the Australian provision akin to section 18(a), the Privy Council stated at p. 99:

The first exception, if its terms are satisfied, entitles the buyer to the benefit of an implied condition that the goods are reasonably fit for the purpose for which the goods are supplied, but only if that purpose is made known to the seller "so as to show that the buyer relies on the seller's skill or judgment." It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express: it will usually arise by implication from the circumstances: thus to take a case like that in question, of a purchase from a retailer, the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment: the retailer need know nothing about the process of manufacture: it is immaterial whether he be manufacturer or not: the main inducement to deal with a good retail shop is the expectation that the tradesman will have bought the right goods of a good make: the goods sold must be, as they were in the present case, goods of a description which it is in the course of the seller's business to supply: there is no need to specify in terms the particular purpose for which the buyer requires the goods, which is none the less the particular purpose within the meaning of the section, because it is the only purpose for which any one would ordinarily want the goods. In this case the garments were naturally intended, and only intended, to be worn next the skin. The proviso does not apply to a case like the sale of Golden Fleece make such as is here in question, because Golden Fleece is neither a patent nor a trade name within the meaning of the proviso to exception (i.).

[35] With respect to the Australian provision akin to section 18(b), the Privy Council stated at 99:

The second exception in a case like this in truth overlaps in its application the first exception; whatever else merchantable may mean, it does mean that the article sold, if only if only meant for one particular use in ordinary course, is fit for that use; merchantable does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination: that is clear from the proviso, which shows that the implied condition only applies to defects not reasonably discoverable to the buyer on such examination as he made or could make. The appellant was satisfied by the appearance of the underpants: he could not detect, and had no reason to suspect, the hidden presence of the sulphites: the garments were saleable in the

sense that the appellant, or any one similarly situated and who did not know of their defect, would readily buy them: but they were not merchantable in the statutory sense because their defect rendered them unfit to be worn next to the skin. It may be that after sufficient washing that defect would have disappeared; but the statute requires the goods to be merchantable in the state in which they were sold and delivered; in this connection a defect which could easily be cured is as serious as a defect that would not yield to treatment. The proviso to exception (ii.) does not apply where, as in this case, no examination that the buyer could or would normally have made would have revealed the defect. In effect, the implied condition of being fit for the particular purpose for which they are required, and the implied condition of being merchantable, produce in cases of this type the same result. It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g., woollen under-garments, a hot-water bottle, a second-hand reaping machine, to select a few obvious illustrations.

[36] Professor Fridman, in *Sale of Goods in Canada*, 6th ed, (Toronto: Carswell, 2013) at 186 explains the plaintiff's burden of proof with respect to defective goods:

Where a buyer alleges that goods are not of merchantable quality it may not be necessary for the buyer to prove affirmatively that the goods were defective. The trial court is entitled to draw the inference of defective quality even though the cause of the defect remains unknown, as long as the buyer provides evidence from which the buyer's own faulty workmanship is excluded as a possible cause of the defect in the goods.

[37] In *Grant*, the Privy Council noted, at 95:

... the manufacturers' secretary was called and deposed that in the previous six years the manufacturers had treated by a similar process 4,737,600 of these garments, which they had sold to drapers throughout Australia, and he had no recollection of any complaints, which, if made, would in ordinary course have come under his notice.

and further, at 96:

Mr. Greene, for the respondents, quite rightly emphasized how crucial it would have been for the appellant's case to prove, by positive evidence, that in fact the garments which the appellant wore contained an excess of free sulphites. He contended that the appellant's case involved arguing in a circle; his argument, he said, was that the garments must have caused the dermatitis because they contained excess sulphites, and must have contained excess sulphites because they caused the disease: but nought, he said, added to nought still is no more than nought. This, however, does not do justice either to the process of reasoning by way of probable inference which has to do so much in human affairs, or to the nature of circumstantial evidence in law courts. Mathematical, or strict logical, demonstration is generally impossible: juries are in practice told that they must act on such reasonable balance of probabilities as would suffice to determine a reasonable man to take a decision in the grave affairs of life. Pieces of evidence, each by itself insufficient, may together constitute a significant whole, and justify by their combined effect a

conclusion.

[38] In the case at bar the plaintiff had a sore thigh muscle, bought the medicated patch at the defendant pharmacy, applied the patch to her thigh (an area without a wound or damaged skin) and removed the patch a short time later when it became too painful. She then sought medical care within a few hours by consulting with her family physician. In these circumstances the Court will draw the inference that the medicated patch was not of merchantable quality or not fit for the purpose. The plaintiff is entitled to an award of general damages.

IV. Quantum

[39] Section 56(2) of the Sale of Goods Act provides the measure of damages. Section 56(2) reads:

The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

[40] It is foreseeable that in the ordinary course of events a defective medical analgesic patch (whether defective as a consequence of manufacturing, storage or some other cause) could injure the skin. It is also foreseeable that a person may be proud of or may be self-conscious as to his or her physical appearance.

[41] The Court has reviewed the authorities counsel provided regarding the appropriate quantum for an award:

Plaintiff:

Anderson v. Lancaster, 1999 BCCA 1

Austin v. Bubela, 2011 ONSC 1958

Harris v. Pavel, 1997 CanLII 4169 (B.C.S.C.)

Saragossi v. Canadian Airlines Int'l Ltd., [1999] Q.J. No. 1342 (S.C.)

Schade v. Chris, 2005 CanLII 25099 (O.N.S.C.)

Defence:

Bain v. Black & Decker Canada (1989) Inc., [2009] O.J. No. 2163 (S.C.J.)

Bear (Litigation Guardian of) v. Lambos, [2005] S.J. No. 232 (Q.B.)

Biring v. Advanced Laser Clinics Burnaby Inc., [2002] B.C.J. No. 1972 (P.C.)

Kler v. Dardano, 2001 BCPC 382

McSween v. Louis, [1997] O.J. No. 3702 (Gen. Div.)

Ramotar v. La Fontaine Jeunesse, [2010] O.J. No. 5069 (S.C.J.)

Robichaud v. Laser Centre Moncton Inc., [2005] N.B.J. No. 7 (Small Claims)

Whitney v. University College of the Cariboo, 2004 BCSC 1110

[42] The Court also considered the decision of the Ontario Superior Court Justice in Ayana v. Skin Clinic, [2009] O.J. 3341.

[43] No two cases regarding physical injury will ever be identical. With respect to a scar, the size, severity and location of the scar are some of the particular factors. The injured party's perception of the injury is also an important factor. In determining the appropriate award, the Court has considered the plaintiff's anxiety with respect to the scar. The Court has also included as a factor the tingling she experiences at the site of the scar. The Court awards \$25,000 as non-pecuniary damages.

[44] Pursuant to s. 20(1) of the Health Care Costs Recovery Act, a further amount of \$4,446.47 is assessed as applicable to the health care costs recovery claim in accordance with the Minister's Certificate issued under s. 16 of the Health Care Costs Recovery Act and filed in these proceedings. The defendant pharmacy did not challenge the health care costs recovery claim.

V. Conclusion

[45] The Court awards the plaintiff general damages of \$25,000 against the defendant, O. Alasaly Pharmacy Ltd. and the \$4,446.47 health care costs recovery amount.

Vi. Costs

[46] Defence counsel asked to be given the opportunity to speak to costs. If required, the Court asks that counsel arrange through Trial Scheduling a one-hour, 9:00 a.m. hearing within the next 90 days.

"Funt J."

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