IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Miller v. Merck Frosst Canada Ltd.,*
2011 BCSC 1759

Date: 20111221
Docket: S110437
Registry: Vancouver

Between:

Michael Miller

Plaintiff

And

**Merck Frosst Canada Ltd., Merck Frosst Canada & Co.
Merck & Co., Inc., Merck Sharpe & Dohme Corp.**

Defendants

Before: The Honourable Mr. Justice R. Punnett

Reasons for Judgment on Disclosure Application

In Chambers

Counsel for the Plaintiff:	D.A. Klein N. Hartigan
Counsel for the Defendants:	J.T. Sullivan S. Knowles
Place and Date of Hearing:	Vancouver, B.C. November 7, 2011
Place and Date of Judgment:	Vancouver, B.C. December 21, 2011

Introduction

[1] This class action proceeding has not yet been certified. It concerns finasteride, a drug sold as a cosmetic treatment for male pattern hair loss. The defendants are the inventors of the drug and it is sold by them under the brand names Propecia (1 mg tablets) and Proscar (5 mg tablets). It is alleged that the defendants failed to warn that the drug may cause persistent side effects including sexual dysfunction.

[2] The defendants apply for production of medical and pharmaceutical records of the proposed representative plaintiff and others. Their motion specifically requests:

(a) Medical services plan printout;

(b) Medical records of the primary care physician five years prior to the date he was prescribed Proscar, Propecia or generic finasteride to present;

(c) Treatment records of the prescribing physician, including but not limited to the notes of the prescribing physician of the discussion he or she had with the patient concerning the benefits and risks of the prescribed medicine (Proscar, Propecia or finasteride);

(d) PharmaNet records for five years prior to the date he was prescribed Proscar, Propecia or finasteride to the present;

(e) Medical records of any specialists he has seen regarding sexual dysfunction prior to taking Proscar, Propecia or generic finasteride;

(f) Medical records of specialists he has seen after taking Proscar, Propecia or finasteride regarding symptoms of sexual dysfunction, including from endocrinologists and sexual physiologist and other specialists he consulted;

(g) Counseling records;

(h) Records of blood test results taken to assess hormone levels and medical records from any physicians who prescribed hormone therapy treatment; and

(i) Records of any other examinations undertaken, tests ordered, and the results of those tests.

[3] The defendants state that they seek production at this stage as to proceed to certification with inadequate materials could lead to an adjournment of the application for certification pursuant to s. 5(6) of the *British Columbia Class*

Proceedings Act, R.S.B.C. 1996, c. 50 (the "*Act*") and that it is more appropriate to avoid such an outcome by ensuring that adequate evidence is before the court.

[4] Applications for disclosure before certification often raise subtle distinctions between evidence relevant to the certification process and evidence which goes to the merits of the claim. The former evidence is permissible, the latter is not.

Background

The Plaintiff's Evidence

[5] The plaintiff alleges he was prescribed Proscar by his physician to treat male pattern hair loss and, as a result, suffered permanent sexual dysfunction. As the proposed representative plaintiff, he seeks to bring his application on behalf of class members he says were prescribed Propecia or Proscar in British Columbia and elsewhere in Canada.

[6] In his application for certification the plaintiff described the common issues as follows:

a. Can ingesting Propecia or Proscar cause side effects that continue after ceasing to take Propecia or Proscar?

b. Are Propecia and/or Proscar defective or unfit for the purpose for which they were intended (including usages that ought reasonably to have been foreseen by the Defendants) as designed developed, manufactured, sold, imported, distributed, marketed or otherwise placed into the stream of commerce in Canada by one or all of the Defendants?

c. Did all or any of the Defendants owe a duty of care to the class members?

d. What was the nature of the duty of care?

e. Did all or any of the Defendants breach this duty, if so when?

f. If the Defendants, or any of them, breached a duty of care owed to class members, were the Defendants, or any of them, guilty of conduct that justifies punishment?

g. If the answer to common issue 4 is "yes" and if the aggregate compensatory damages awarded to class members does not achieve the objectives of retribution, deterrence and denunciation in respect of such conduct, what amount of punitive damages is awarded against the Defendants, or any of them?

h. Did the Defendants' solicitations, offers, advertisements, promotions, sales and supply of Propecia and Proscar for personal, family or household use by class members fall within the meaning of "consumer transactions" under the Business Practices and Consumer Protection Act ("BPCPA")?

i. With respect to the supply in British Columbia of Propecia and Proscar to class members for their personal, family or household use, are the Defendants, or any of them, "suppliers" as defined in the BPCPA?

j. Are the Class members "consumers" as defined by the BPCPA?

k. Did the Defendants, or any of them, engage in conduct that constituted deceptive acts or practices contrary to the BPCPA as alleged in the Amended Notice of Claim?

[7] The plaintiff's proposed class definition is:

> All persons who were prescribed Propecia and/or Proscar in British Columbia for hair loss and experienced side effects which continued after ceasing to take these drugs.

[8] The plaintiff states he had no issues respecting sexual functioning prior to taking Proscar, that he has received counselling; that he has "seen many health professionals" including "several endocrinologists and a sexual psychologist" all with respect to his alleged sexual dysfunction. He also refers to blood tests respecting his hormone levels and hormone therapy treatment. He does not identify any of the health professionals nor disclose any medical or pharmaceutical records.

[9] He has filed in support of his certification application, an affidavit of Dr. Wright a Professor at the University of British Columbia, Department of Anesthesiology, Pharmacology and Therapeutics and the Department of Medicine. Dr. Wright apparently has not treated the plaintiff.

[10] Dr. Wright does provide information respecting product monographs, the nature of Propecia and Proscar and refers to adverse reactions associated with its use including decreased libido, erectile dysfunction and ejaculation disorder. He also states that long term adverse effects are largely unknown due to long term trials to assess these effects not having been conducted.

[11] The material filed by the plaintiff also asserts that the defendants failed to provide warnings in Canada of adverse effects while doing so in other countries, including the United Kingdom, Sweden, Italy and the United States.

[12] The plaintiff alleges that he took Proscar for his thinning hair. Shortly thereafter his sexual functioning diminished, he sought medical assistance and ceased taking the medication yet continues to suffer side effects including a loss of interest in sexual activity, a cessation of thinking about sex, an inability to maintain an erection, reduced ejaculate, no spontaneous erections and no pleasure or effect from manual stimulation. He also states that he began to feel anxious and upset in social situations for no apparent reason.

[13] The plaintiff deposes that he took Proscar, which is a higher dose version of the same medication as Propecia, and then, on his doctors advice used a pill splitter to cut the pill into quarters and took one quarter daily. This was a cheaper option than purchasing Propecia.

[14] In addition, the plaintiff has provided through counsel's staff an affidavit to which are attached copies of the Propecia and Proscar product monographs from the Compendium of Pharmaceutical Specialties (a desk reference of health care providers containing product monographs for prescription drugs sold in Canada) for the years 1999 to 2011. None of these documents contain a warning of continued sexual dysfunction after discontinuation of the use of Propecia or Proscar.

[15] Also attached is a printout of the Product Monograph for Prepecia and Proscar dated October 6, 2010 from the Health Canada Drug Product Database which was updated from the versions in the Compendium to include depression as a post-market adverse reaction.

[16] In addition the affiant attaches search results from the Canada Vigilance Adverse Reaction Online Database current from 1965 to March 31, 2011 which contains information about suspected adverse reactions submitted to Health Canada by health professions and consumers who voluntarily report. The Database also

includes reports by manufacturers and distributors. The affiant found 26 reports in the Database, 19 of which were Adverse Reaction Reports listing the outcome of the adverse event as “not recovered/not resolved.”

The Defendant’s Evidence

[17] The defendants rely on evidence from Dr. Stacy Elliott, an expert in Sexual Medicine and the Medical Manager of the British Columbia Centre for Sexual Medicine, who describes sexual function as “a biopsychosocial phenomenon,” that is one in which biology, psychology, thoughts, emotions and behaviors as well as social factors, all play a role. Such factors are stated to be involved in sexual response which is described as “a complex, multi-level feedback loop.” Dr. Elliott also deposes that some prescription medications may be associated with male sexual dysfunction.

[18] She states “... [a]t the outset, based on my considerable experience, it is exceedingly rare that a young man like the Plaintiff would be afflicted with “permanent” sexual dysfunction. Moreover, in my experience, sexual dysfunction is not typically associated with a single factor or incident. As explained above, sexual function is biopsychosocial and there are a myriad of causes of male sexual dysfunction.”

[19] The defendants have also filed an affidavit from Dr. Bhatti, a Doctor of Pharmacy practising as a Pharmacist in British Columbia who deposes on the availability of doses of finasteride; the providing of in-house patient drug information leaflets by pharmacies to patients; and the use of generic as opposed to brand name drugs. His affidavit is filed in support of the request for the plaintiff’s pharmaceutical records.

Defendants’ Position

[20] The defendants assert that the plaintiff has put the issues of his treatment and diagnosis at issue but has failed to provide an evidentiary basis supporting his treatment and diagnosis. Further, he does not name any of the medical

professionals he has seen nor does he provide medical or pharmaceutical records. As a result, the defendants bring this application challenging the adequacy of the proposed representative plaintiff's materials and seek an order for production of his medical and pharmaceutical records along with the records of 10 other proposed class members, for the 5 years before the prescribing of Proscar, Propecia or generic finasteride to the present in order to address that alleged inadequacy.

[21] The defendants argue that bare assertions such as those made by the plaintiff are insufficient. According to defence counsel, they appear "to be based solely on an alleged temporal relationship between allegedly taking Proscar and the onset of symptoms" and as a result an allegation that the "sexual dysfunction allegedly was caused by Proscar." Defence counsel states that "[t]he affidavits filed by the Plaintiff are devoid of evidence and the certification record is wholly inadequate for this Court to make a reasoned determination of the certification criteria. The Plaintiff has filed no scientific or medical evidence that supports the allegation that Proscar caused the sexual dysfunction giving rise to the Plaintiff's claim, nor has the Plaintiff posited a mechanism of action pursuant to which Proscar could have caused his alleged permanent sexual dysfunction."

[22] The defendants also state that the opinion of Dr. Wright is of little weight as he was not a treating physician, his expertise is in the area of hypertension treatment, he does not work in the field of sexual psychology and neurology and finally that he offers no opinion respecting the cause of the plaintiff's alleged sexual dysfunction.

[23] The defendants argue that the requested records are required in order for the court to address common issues (*Act* s. 4(1)(d)) and that the court must consider the matters set out in s. 4(2) including "(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members."

[24] The pharmaceutical records are said to be required in order to determine what information the plaintiff received from his pharmacy, what medicine he was

dispensed, by whom it was dispensed and generally what information he was given when it was dispensed. They also state that pharmacists automatically substitute branded prescriptions with generic versions if available. The latter they say is relevant to a determination of what brand or generic drug was dispensed. In addition the PharmaNet record will address compliance with correct dosages.

[25] With respect to the records of 10 other possible class members, they state production of such records by a representative sample are directly relevant to the certification criteria as they will "shed light on whether there is an identifiable class of people who took Proscar or Propecia and thereafter experienced continuing sexual side effects." They also submit such records are relevant to the common issues criteria, the preferability analysis and the issue of the plaintiff's suitability as class representative.

Plaintiffs' Position

[26] The plaintiff's position is that the materials provided by the plaintiff are sufficient and that the defendants are venturing into the merits of the claim, something they ought not to be permitted to do at this stage of the proceeding.

[27] The plaintiff alleges that the defendants have failed to warn of the risk that the drug may cause persistent side effects including sexual dysfunction in Canada despite having done so in other countries, including Sweden, Italy and the United States.

[28] The defendants' expert fails to provide any evidence of when the generic version was actually available in Canada. Yet the defendant's request pharmaceutical records on the basis that they are required to determine whether the plaintiff took the defendants' drug or a generic version of the drug. Such information was presumably available to the defendants. The plaintiff has filed information from the Drug Product Database maintained by Health Canada which shows that the defendants first obtained marketing approval for Proscar in Canada on December 31, 1992 and for Propecia on July 9, 1998 and that the generic version of finasteride was not available in Canada prior to February 1, 2010. The plaintiff's

evidence is that he started taking Proscar on May 21, 2008 and stopped on January 31, 2009. It therefore appears that the plaintiff did not take, and could not have been prescribed, a generic version of the drug.

[29] The evidence is as well that of the 44 British Columbia men who have contacted plaintiff's counsel about this proceeding, all but one started taking the prescription before February 1, 2010 and 32 of the 44 reported having stopped taking the drug prior to February 1, 2010.

[30] They also argue that Dr. Bhatti's comments on drug compliance are general comments only and are not relevant at this stage of the proceedings.

[31] Dr. Stacey Elliott concedes that pharmaceuticals can cause male sexual dysfunction. The plaintiff's argue that just as in any tort, there may be multiple potential causes of an injury.

The Law

[32] The purpose of the *Act* is to promote access to justice, judicial economy and behaviour modification (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, paras. 26-29). The court assumes a gatekeeper role as the *Act* requires that a certification hearing occur as a first step in a class action proceeding. The certification hearing is procedural. It is "not a determination of the merits of the proceeding" (*Act*, s. 5(7)). Its purpose is to determine if the action is suitable for a class proceeding.

[33] Section 4(1) of the *Act* obligates the court to be satisfied that the plaintiff has met the following requirements:

> 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:
>
> (a) the pleadings disclose a cause of action;
>
> (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, ...

[34] That the pleadings disclose a cause of action is determined by their review and does not require evidence in support. With respect to the remaining factors however, as stated by Chief Justice McLachlin in *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25:

> [25] I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub* held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence"). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see Branch, *supra*, at para. 4.60.

[35] Whether the class representative must show some basis in fact for each of the certification requirements is addressed by determining whether additional information is required for the certification hearing bearing in mind that the concern at this stage is limited to procedure, not the merits of the claim (*Jones v. Zimmer*, 2010 BCSC 1504, para. 22).

[36] As noted by Strathy J. in *Roveredo v. Bard Canada Inc.*, 2010 ONSC 5240:

> [9] It is not always easy to separate, prior to the certification hearing, where an examination of the “basis in fact” ends and an impermissible excursion into the merits begins. Nor is it always easy to say whether a particular piece of evidence, viewed in isolation, will assist the court in addressing the certification test. …

[37] A similar concern was voiced by Lax J. in *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303, 176 A.C.W.S. (3d) 947 (Ont.S.C.J.), as follows:

> **15** The plaintiffs have an evidentiary burden to show "some basis in fact" for each of the certification requirements other than the requirement in section 5(1)(a) that the claim discloses a cause of action. "Some basis in fact" is an elastic concept and its application can be vexing. It is sometimes easier to articulate what it isn't, rather than what it is. It is not a requirement to show that the action will probably or possibly succeed. It is not a requirement to show that a *prima facie* case has been made out. It is not a requirement to show that there is a genuine issue for trial.
>
> **16** These thresholds do not have to be met on a certification motion as there is no assessment of the merits at the certification stage. Certification is a procedural motion focusing on the form of the action. As such, the court is required to assess whether there is 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 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402.

[38] The definition of “fact” is defined in the Concise Oxford English Dictionary as “a thing done or performed.” Phipson on Evidence, 17th ed (2010) pp. 1-11 states:

> No satisfactory definition of the term “fact” has been or perhaps can be given. Broadly it applies to whatever is the subject of perception or consciousness. But juridically it has generally to be distinguished from *law*, sometimes from *opinion* and sometimes from *testimony* and *documents*. It is not possible always to apply these distinctions consistently.

[39] While the basis in fact is more than simply disclosing a cause of action, the assertion of facts is still restricted to facts and not the evidence needed to prove them.

[40] The Supreme Court of Canada in *Hollick* did not state “some basis in evidence.” It stated “some basis in fact.” The difference is important. One goes to the merits of the claim, the other to whether the assertions made are sufficient to allow the court to determine if the proceeding is of the type that is suitable for certification.

[41] Section 5(6) of the *Act* states:

> (6) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

[42] This wording is the same as that of the *Ontario Class Proceedings Act* (S.O. 1992, c. 6) considered by the court in *Hollick*. Such evidence as may be permitted is only relevant to the issues considered for certification, a procedural step. In my view the word "evidence" as used in s. 5(6) of the *Act* and in *Hollick* is used in the limited sense of establishing an allegation of fact not in the sense of proof of that fact.

[43] The production of medical records from a representative plaintiff prior to certification has not often been ordered in British Columbia.

[44] In *Stanway v. Wyeth Canada Inc.*, 2010 BCSC 1497, Gropper J. addressed an allegation that the plaintiff contracted breast cancer as a result of taking the defendants' prescriptions in combination with other medications. The defendants provided medical reports which described the myriad of factors that are involved in breast cancer. The court, after reviewing a number of authorities, stated at para. 21:

> [21] The principles thus derived are:
>
> 1. Precertification disclosure is ordered in the exceptional case where the defendant demonstrates that the record before the court for the certification hearing will be inadequate for consideration of the issues at that stage of the proceedings.
> 2. In considering whether an order for disclosure ought to be made the court must address the goals of judicial economy, access to justice, and behaviour modification.
> 3. It can be assumed that each individual's medical record will be unique. However, the medical evidence suggesting the significance of the individual factors of those who may have been prescribed and ingested the prescription drug may be necessary to furnish the evidentiary record;
>
> and specifically in British Columbia,

> 5. There is no right to examine the representative plaintiff or other affiants in British Columbia; an order of the court is required.
>
> 6. In British Columbia, in accordance with the *Act*, the court must consider whether the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members, and whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members.

[45] In *Stanway* the order was granted. Gropper J. explained:

> [22] I am satisfied that this is the exceptional case where precertification disclosure of medical records must be made. The individual risk factors identified in those records, and notes of the prescribing physician of the discussion he or she had with the patient concerning the benefits and risks of HRT and of Premarin and Premplus specifically, and the records of the examinations undertaken, test ordered and the results are necessary for my determination of the predominance of common issues and whether this class proceeding ought to be certified. This is particularly so when I consider whether there is a causal connection between Premplus and Premarin in combination with progestin and breast cancer, and if so, its nature and extent, as well as those issues concerning potential violations of the *BPCPA* or the *TPA*.

[46] The defendants in *Stanway* filed two expert reports which addressed the actual risk of breast cancer due to hormone therapy when other breast cancer factors are considered. One of the experts stated that "... it cannot be said that HRT [hormone replacement therapy] causes breast cancer. …"

[47] As a result in *Stanway* there were medical issues potentially relevant to the common issue of a connection between HRT and breast cancer.

[48] However, tellingly, when the certification hearing later proceeded before Gropper J. as observed by Smith J. in *Bartram v. Glaxosmithkline Inc.,* 2011 BCSC 1174, at para. 15 there was only a brief reference to such records:

> [15] I also note that, subsequent to his application being argued, Gropper J. has given reasons for judgment on certification in *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057. Although production of medical records had been ordered, evidence from those records does not appear to have played a significant role in the certification hearing. Only one of 82 paragraphs in the

> judgment refers to a submission based on the records and Gropper J. did not accept that submission.

[49] In *Roveredo* the proposed representative plaintiff was ordered to produce his medical records before certification. His claim related to a medical device designed for use in the repair of hernias. The plaintiffs had provided evidence of their medical problems leading to hernia surgery and the medical difficulties suffered thereafter. The plaintiffs also produced medical records relating to their surgeries and their subsequent state of health. The court reviewed the applicable principles at paras. 7, 8 and 9 as follows:

> 7 It is well-settled that the certification motion is not intended to be a test of the merits of the action: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 205 D.L.R. (4th) 19 at para. 16. Moreover, the evidentiary burden on the plaintiff on certification is not onerous - the plaintiff need only establish a "basis in fact" for the certification requirements in s. 5(1)(b), (c), (d) and (e) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6: *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379, [1998] O.J. No. 2694 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576, [1999] O.J. No. 5737 (Div. Ct.).
>
> 8 It is equally well-settled, however, that the court has jurisdiction to require the plaintiff to produce additional documentation, including medical records, to enable the defendant to properly respond to the plaintiff's evidence and to ensure that there is an adequate evidentiary record: see *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314, [1997] O.J. No. 2576 (Gen. Div.); *Schroeder v. DJO Canada Inc.* (2009), 77 C.P.C. (6th) 279, [2009] S.J. No. 460 (Q.B.). As was noted in the latter case, at para. 60, pre-certification disclosure of documents, such a[s] medical records, has been ordered in a number of cases - see: *Frey v. BCE Inc.* (fiat of Gerein, C.J. dated February 24, 2005), Q.B.G. No. 1611 of 2004, J.C.R.; *Caputo v. Imperial Tobacco Ltd.*, above; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2007 BCSC 1663, [2008] 3 W.W.R. 761; *Kimpton v. Canada (Attorney General)*, 2002 BCSC 67, 97 B.C.L.R. (3d) 119.
>
> 9 It is not always easy to separate, prior to the certification hearing, where an examination of the "basis in fact" ends and an impermissible excursion into the merits begins. Nor is it always easy to say whether a particular piece of evidence, viewed in isolation, will assist the court in addressing the certification test. It is undesirable that representative plaintiffs be subjected to burdensome production motions and extensive cross-examinations on what is meant to be a procedural motion. On the other hand, the process must be fair and the defendant must be given a reasonable opportunity to respond to the plaintiff's evidence. As well, the court cannot address certification in a vacuum. The apparent commonality of the issues and preferability of the procedure may appear obvious when looking at the pleadings or a limited record, but may become less obvious when a full and balanced record is available.

[50] The court then ordered production as follows:

> 10 Ultimately, the decision is driven by the circumstances of the particular case and requires a degree of balancing, so as to be fair to both parties. In this case, I have concluded that the records in question should be produced for the following reasons:
>
> (a) the records relate directly to medical conditions to which the plaintiffs have referred in their affidavits, the treatment they received for those conditions, and the consequences of that treatment;
>
> (b) the records may be relevant to the commonality analysis under s. 5(1)(c) of the *C.P.A.* and may be particularly relevant to the preferability analysis under s. 5(1)(d) - they may assist the court in determining whether, viewed in the entire context of the case, the resolution of the common issues will sufficiently advance the claims of the class to warrant a finding that a class action is preferable to individual actions;
>
> (c) the records may assist the court in determining whether the plaintiffs are appropriate representatives of the class, keeping in mind that the proposed action covers a variety of products;
>
> (d) the request for records is focused - it is not a fishing expedition. It is made *bona fide* and not with the purpose of placing unwarranted and intrusive burdens on the plaintiffs;
>
> (e) the defendants will bear the costs of obtaining the information - the plaintiffs need only provide written authorization; and
>
> (f) the plaintiffs' privacy rights will be adequately protected by the normal rules of litigation.

[51] Also, in *Caputo v. Imperial Tobacco Ltd*. (1997), 34 O.R. (3d) 314, para. 19, Winkler J. accepted that there were a “myriad of potential issues relating to each class member’s medical condition and to individual choices which may have been made to commence and continue smoking.”, and as a result the evidentiary record was insufficient without production of the plaintiff’s medical records.

[52] As noted earlier, more commonly in British Columbia such pre-certification production has been refused.

[53] In *Jones v. Zimmer*, 2010 BCSC 1504, Loo J. denied such production and in doing so, summarized the case law across Canada as follows:

> [28] From my review of authorities, I accept that generally the courts in Canada have refused to order that medical records be produced prior to certification, except in exceptional circumstances, including where the record on the certification issue may be inadequate. The party requesting production has the onus of demonstrating that the documents are necessary for the certification application.

[54] In *Bartram* Smith J. stated:

> [16] In Jones, which was decided the day before *Stanway* was argued, Loo J. denied the defendant's application for production of medical records prior to certification. Jones concerned an allegedly defective hip implant. Leo J. referred (as did Gropper J. in *Stanway)* to *Pardy v Bayer Inc.,* 2003 NLSCTD 130. In that case, which dealt with the alleged adverse effects of a drug, the court said at paras. 47 and 48:
>
> > The Defendant contended that the medical records are relevant to whether the Plaintiffs are in the classes proposed, whether the Plaintiffs are representative and whether certification is warranted. The Defendant challenged the class definition proposed by the Plaintiffs and argued that factors such as the timing of prescriptions, the amount of prescribed dosages, co-prescription of other drugs and the advice of the Plaintiffs* physicians may indicate that the only classes worthy of consideration would be too narrow to warrant certification. The Defendant submitted that the Plaintiffs' medical records may provide information on these factors.
>
> The medical records of the Plaintiffs are clearly relevant to the merits of their individual claims but, as noted above, the certification stage is not meant to determine the merits of the action. Indeed the Court must be vigilant to ensure that the certification application does not become mired down in the merits of an individual claim. [Emphasis added]

See also *Pardy v. Bayer Inc.*, 2003 NLSCTD 130; *Hollick* para. 16; *Class Proceedings Act,* s .5(7).

[55] In *Pearson v. Inco Ltd.* (2002), 22 C.P.C. (5th) 167, 113 A.C.W.S. (3d) 769 (Ont.S.C.J.), Nordheimer J. stated at para. 12:

> 12 In the end result, there are likely to be two results if the medical records are produced. One is that they will reveal nothing more than the defendants already know and will be of no use on the certification motion at all. The other is that they will reveal information which might cast doubt on the merits of the plaintiffs claim but that is an impermissible use of the records at

> this stage of the proceeding. Either way, the medical records will not advance the consideration of the issues which are relevant to the certification motion, in that they will not assist in determining whether there are common issues nor will they assist in determining whether a class action is the preferable procedure for the resolution of any common issues. I therefore refuse Inco's request for production of the medical records.

Discussion

Medical Records

[56] Generally, plaintiff's evidence will be sufficient if it states the facts necessary to show that the action is suitable for a class proceeding. That is, does it show some basis in fact for the claims advanced? The Supreme Court of Canada merely requires "some basis" which is a low threshold that is something greater than a simple conclusory allegation unsupported by alleged facts.

[57] In assessing whether the defendants have met the burden of establishing that production of the records is necessary it is appropriate to consider the nature of the action. In a medical products case such as this, the information concerning testing of the drug and the adequacy of any warnings given are within the knowledge of the defendants. Issues relating to individual class members only become relevant after certification when the individual issues of causation and damages will be addressed.

[58] For the reasons previously stated, this is not the time for the evidence supporting the "facts" to be explored, particularly with respect to one or more individuals. Nor is it the time to explore the issue of other causes of the disability claimed by the plaintiff and other probable members of the class. The inquiry is restricted to determining if, based on the facts alleged, it is one that is suitable for a class proceeding. In seeking the medical records the defendants are, in my opinion, seeking evidentiary proof of the facts alleged as they relate to one or more individuals. This constitutes a clear intrusion into the merits of the claim. Therefore, I am not satisfied that the defendants have shown that the circumstances of this case are so exceptional that the requested medical records are required for certification.

Pharmaceutical Records

[59] The requested production of pharmaceutical records raises the same issues as the request for medical records. However there are additional factors to consider. First, based on the material filed it appears unlikely that the majority of potential class members, including the proposed representative plaintiff, used the generic version of finastride. The potential class members claim they used the finastride before the generic of the drug became available.

[60] Second, Dr. Bhatti requested information that would demonstrate the potential class members' compliance with the medication. While that may be an issue with individual class members, it is not relevant to the issue of certification.

[61] Thus, the application for production of such records has not been shown to be necessary for the certification hearing.

10 Other Potential Class Members

[62] The defendants also seek similar production from 10 other potential class members. For the reasons given with respect to the request for the plaintiff's medical and pharmaceutical records, the application is dismissed.

[63] However, even if production of such records was necessary the defendants face a further hurdle. At this point in the proceeding the 10 other potential class members have not bound themselves to participate in the class if it is certified (*Egglestone v. Barker* (2003) 29 C.P.C. (5th) 296 (Ont.S.C.J.), paras. 3 and 4). Prior to certification, the proceeding is an ordinary action governed by the Rules of Court (*Edmonds v. Actton Super-Save Gas Stations Ltd*. (1996), 5 C.P.C. (4th) 101 (B.C.S.C.), at para.12). As a result, precertification potential class members are not parties and, indeed, even if the action is certified they can opt out (*Pearson* at para. 15).

[64] Finally, I see no logic in the request for a "sampling" of the putative class members. Given any class definition will include all persons who potentially have meritorious claims, it is probable that an "acceptable class will include persons who

will not have valid claims" (*Heward v. Eli Lilly & Co*. (2007), 39 C.P.C. (6th) 153 (Ont.S.C.J.), at para. 69).

Conclusion

[65] The application of the defendants is dismissed.

"Punnett J."