NOVA SCOTIA COURT OF APPEAL
Citation: GlaxoSmithKline Inc. v. Cherny, 2009 NSCA 68

Date: 20090617
Docket: CA 304878
Registry: Halifax

Between:

GlaxoSmithKline Inc.

Appellant

v.

Vladimir Cherny

Respondent

Judges:	Roscoe, Oland, Hamiliton, JJ.A.
Appeal Heard:	May 14, 2009, in Halifax, Nova Scotia
Held:	Appeal is allowed, with costs to the appellant per reasons for judgment of Roscoe, J.A.; Oland and Hamilton, JJ.A. concurring.
Counsel:	Teresa J. Walsh and Gordon Proudfoot, Q.C., for the appellant Lynn M. Henry, for the respondent

Reasons for judgment:

[1] This is an appeal from a decision of Justice Charles E. Haliburton dismissing a summary judgment application brought by the defendant in a product liability action, pursuant to **Civil Procedure Rule** (1972) 13.01. The decision under appeal is reported at 2008 NSSC 345; [2008] N.S.J. No. 522 (Q.L.).

Background

[2] For about three weeks in 1999 the plaintiff, Mr. Vladimir Cherny, took a prescription drug, Zyban, which was marketed by the defendant as an aid to stop smoking. In his statement of claim issued in May 2003, Mr. Cherney alleges that he suffered a complete and permanent loss of bodily hair (alopecia universalis) as a result of taking Zyban. The defendant GlaxoSmithKline Inc. (GSK) denies that it was negligent or that Zyban caused Mr. Cherny's loss of hair.

[3] Discovery examinations and document production were completed in 2006 and the matter was scheduled for a jury trial commencing December 1, 2008. In November, 2008 GSK brought a summary judgment application arguing that Mr. Cherny's action should be dismissed on the basis that he had no expert evidence to support his claim.

The decision under appeal

[4] The chambers judge reviewed the facts and argument of counsel and after citing the test that the applicant has to meet in order to establish that there is no arguable issue to be tried, as set out in **Selig v. Cook's Oil Company Ltd.**, 2005 NSCA 36, wrote:

> 12 It is apparent that my conclusion is that there will be (on the basis of the submissions which I have heard) sufficient evidence before the jury at the end of the trial of this matter that the credibility of the Plaintiff and the value of his evidence as to the cause of his hair loss, will be a matter to be left to the jury. Nonetheless, that will be a decision that would more properly be made by the trial judge than by a judge hearing this preliminary application.

After referring to case law cited by the parties, he concluded:

> 18 Counsel on behalf of the Plaintiff has emphasised the need for a Judge to be "satisfied" that the Plaintiff cannot prove the necessary essential facts before a summary judgment should be granted against him. To use the colloquial term the Plaintiff should have his "day in Court". On his behalf, Mr. Spicer emphasises the remarkable timing of the ingestion of the drug and the time of the hair loss. He points out that alopecia was recognized as a side effect of Wellbutrin by the drug company before 1999 and that it was acknowledged with respect to Zyban in the year following [Mr.] Cherny's hair loss. He emphasises, as well, the fact that Mr. Cherny had experienced difficulty with alopecia, a word with which he was familiar and understood, before he sought this medication to assist in his battle against nicotine. Counsel argues that if that word had appeared as a possible side effect of using this drug, then his client would clearly not have used it. On this application he argues that the expert's report produced on behalf of the Defendant, Dr. Cheryl Rosen, a physician and an associate professor at the University of Toronto is not unequivocal in its conclusions, although finally expressing the view that there is "no connection" between Zyban and Mr. Cherny's *alopecia universalis*.
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> 19 At this stage at least, I think it is appropriate that the finder of fact should have an opportunity to assess the weight they will be prepared to give to the evidence offered by Mr. Cherny and his witnesses against the weight which they will be prepared to give to the expert evidence which will presumably be offered by Dr. Rosen or some other physician.
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> 20 The Application for summary judgement is denied with costs in the cause.

Grounds of appeal

[5] Although the appellant lists five grounds of appeal, the issue can be simply stated as: did the chambers judge err in dismissing the summary judgment application?

Standard of review

[6] Since the application for summary judgment was dismissed, the order under appeal did not have a terminating effect. Thus the standard of review is the usual standard applied to appeals of interlocutory orders, that is, we will not intervene unless wrong principles of law were applied or a patent injustice would result. See: **Huntley (Litigation guardian of) v. Larkin Huntley**, 2007 NSCA 75 and the cases cited therein at ¶ 23.

Analysis

[7] The application by the defendants for summary judgment was made pursuant to **Civil Procedure Rule** (1972) 13.01(a) which provides:

> 13.01. After the close of pleadings, any party may apply to the court for judgment on the ground that:
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> > (a) there is no arguable issue to be tried with respect to the claim or any part thereof; ...

[8] In **MacNeil v. Bethune**, 2006 NSCA 21, this court dealt with a similar case where the defendants succeeded on a summary judgment application because the plaintiffs were unable to produce expert evidence to support their theory of medical malpractice. In that case, the test for summary judgment was described in the following passages:

> [20] In **United Gulf Developments Limited v. Iskandar**, 2004 NSCA 35, this court stated:
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> > [9] ... the appropriate test where a defendant brings an application for summary judgment in Nova Scotia is the test as set out in **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C. R. 423:
> >
> > > 27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See **Hercules Managements Ltd. v. Ernst & Young**, [1997] 2 S.C.R. 165, at para. 15; **Dawson v. Rexcraft Storage and Warehouse Inc.** (1998), 164 D. L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; **Irving Ungerman Ltd. v. Galanis** (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then " establish his claim as being one with a real chance of success" (**Hercules**, *supra*, at para. 15).
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> [21] As stated in **Selig v. Cooks Oil Company Ltd.**, 2005 NSCA 36, it is a two part test:
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> > [10] ... First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the

> respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

[9] In **McNeil v. Bethune**, it was determined, based on the medical evidence filed on the application for summary judgment, that:

> [28] ... there was no controversy of fact or law that required resolution by a trial. If the matter were permitted to go to trial, the plaintiffs would have no chance of success because they have no evidence to support their allegations that the damages they suffered were caused by or contributed to by any act or omission of the defendants.

[10] In this case, the evidence that GSK presented on its application for summary judgment, consisted of two affidavits. The first, sworn by its counsel, set out the history of the proceeding and attached as exhibits copies of the pleadings along with the notice of trial, a consent order, the date assignment conference memorandum, letters between counsel, the plaintiff's medical reports and excerpts of the discovery of the plaintiff. The second affidavit, sworn by the defendant's expert witness, Dr. Cheryl Rosen, attached her expert opinion regarding Mr. Cherny's condition and her curriculum vitae. The defendant also filed material relied upon by Dr. Rosen, in developing her opinion such as the product monographs for Zyban and various medical journal articles. The plaintiff filed an affidavit of his counsel attaching further excerpts from the discovery of the plaintiff and copies of portions of product monographs for Zyban which indicate that alopecia was first listed as a possible side effect for Zyban in March, 2000.

[11] It is clear from the affidavits that Mr. Cherny does not have any expert medical or scientific evidence to present at the trial that supports his theory that the Zyban caused his hair loss. When his counsel filed the notice of trial in March 2007, he said "expert evidence will be adduced on behalf of my client and any expert's report will be filed in accordance with **Rule** 31.08". Then at the date assignment conference in August 2007, it was noted that Mr. Cherny "anticipates filing an expert report prior to trial". Despite these statements, none has in fact been filed.

[12] The medical reports from two doctors that Mr. Cherny consulted were included in the material filed by the defendants on the application for summary judgment. In the statement of claim, it is alleged that Mr. Cherny lost all of his

hair within three weeks of taking Zyban in December 1999. However, Dr. Julius Martin, a dermatologist, reported on September 6, 2000 that Mr. Cherny had experienced circular patches of hair loss on his scalp "over the years", and "over the past 12 months hair loss has progressed and the patient is totally devoid of hair." Dr. Martin does not refer to Zyban in his September 2000 letter. In a July 2002 letter, Dr. Martin notes that Mr. Cherny believes that Zyban caused his hair loss.

[13] Mr. Cherny was also seen twice by Dr. C. J. Gallant, another dermatologist. In his report of September 27, 2006 to Mr. Cherny's family practitioner, Dr. Gallant states that Mr. Cherny:

> ... reports having had as a child patches of hair loss that would come and go into his teen years. His current problem however began in approximately December of 1999 when he had a trial of Zyban.

Dr. Gallant diagnosed alopecia universalis which is "generally considered to be an idiopathic autoimmune disease."

[14] In a further report dated March 28, 2007, Dr. Gallant indicated he had been asked to assess whether there was a possible association between the alopecia and the use of Zyban. His opinion was:

> Alopecia universalis is a well documented variation of the more common and usually self-limited alopecia areata. This disease is usually considered an idiopathic auto immune disease that first presents with annular areas of non-scarring alopecia which usually regrows completely over a 6 to 9 month period often first noted in childhood. Up to 2% of the general population may be affected with only a small number going on to develop complete and permanent loss of hair. Drugs are not listed as a cause of alopecia universalis in standard texts.
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> A preliminary review of recent literature failed to indicate an association between Zyban and alopecia universalis. Although hair loss is included as a rare complication of Zyban, the monograph and available literature do not include information on the pattern or type of hair loss noted.
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> As I reviewed with Mr. Cherny, although he has noted a temporal association, I am unable to substantiate a direct causal association between hair loss and his medications.

[15] Dr. Rosen, the defendant's expert, explains in her report that the term alopecia means hair loss for any reason. Alopecia areata involves loss of hair in a specific place, such as the scalp. Alopecia universalis, which is another form of the condition, is usually considered to be an auto-immune disease and results in total permanent loss of hair from the whole body. Dr. Rosen stated:

> ... Mr. Cherny describes having had alopecia areata for many years . He had recurrent areas of hair loss that would appear on the scalp and then the hair would regrow. This occurred prior to Mr. Cherny taking Zyban for smoking cessation. ...
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> Because of the [sic] Mr. Cherny's past history of alopecia areata, it is unlikely that Zyban is connected to the onset of alopecia universalis. The descriptions of alopecia attributed to Zyban in the literature (including the Worldwide Product Safety Report for the period July 1, 1999 to December 31, 1999 (excerpt) and the adverse event reports for Zyban and Wellbutrin) are nonspecific and are not that of alopecia areata or alopecia universalis.
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> Conclusion
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> Based on my review of the materials forwarded to me and a review of the literature and my knowledge of natural history and alopecia areata and alopecia universalis, my view is that there is no connection between Zyban and Mr. Cherny's alopecia universalis.

[16] Although he has no medical or scientific evidence to support his claim that Zyban caused his hair loss, Mr. Cherny submits that his own evidence concerning the timing of the hair loss in relation to his use of Zyban and the March, 2000 change in the product monograph is sufficient to raise a genuine issue for trial. He submits that, based on **Snell v. Farrell**, [1990] 2 S.C.R. 311, expert evidence is not required. Reference is made to this excerpt at ¶ 44:

> .... that it is not essential to have a positive medical opinion to support a finding of causation. Furthermore, it is not speculation but the application of common sense to draw such an inference where, as here, the circumstances, other than a positive medical opinion, permit.

[17] In **Snell**, the plaintiff was a 70-year-old woman who lost the sight in her right eye after a cataract operation. Her eye started to bleed after the injection of the anesthetic. Following the surgery, she also suffered from severe glaucoma in

that eye but not the left eye. Her expert witness indicated that the blindness was caused by a stroke in the back of her eye. He could not identify what caused the stroke. The doctor indicated that it would be unusual to have glaucoma in just one eye unless there had been an intervention of some type. The only intervention he was aware of was the operation itself. The defendant's expert was not able to express an opinion as to what caused the plaintiff's blindness with any certainty either.

[18] The Supreme Court of Canada found that the trial judge was justified in drawing an inference that the operation caused the plaintiff's injury and that the doctor was negligent in proceeding with the surgery when he knew that there was bleeding, because there was no evidence to rebut this inference. It is in that context that Sopinka, J. said that it is not essential to have a positive medical opinion supporting a finding of causation.

[19] Subsequently in **Athey v. Leonati**, [1996] 3 S.C.R. 458 the Supreme Court of Canada explained the rationale of **Snell v. Farrell** as follows:

> 16 In **Snell v. Farrell**, *supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in **Alphacell Ltd. v. Woodward**, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

[20] In this case, unlike the plaintiff in **Snell**, Mr. Cherny does not have an expert report which indicates that Zyban is a possible cause of his hair loss, or that there is no other possible cause. If he did have an expert report saying that since he had never experienced any hair loss in the past, it is possible that Zyban caused the alopecia universalis, there would be a genuine issue of fact for trial. However, given the medical history that Mr. Cherny has suffered alopecia at various times since he was a child, the lack of any scientific or medical opinion supporting his theory of causation and the defendant's expert report indicating there is no connection between the alopecia universalis and drug use, it cannot be said that there is a genuine issue of fact for trial.

[21] With respect, the chambers judge erred in the application of the test for summary judgment by finding that there is a genuine issue of fact to be determined at trial. As in **McNeil v. Bethune**, if the matter were permitted to go to trial, the plaintiff would have no chance of success because he has no evidence to support his allegations that the damages he suffered were caused by or contributed to by any act or omission of the defendant.

[22] It is necessary for the plaintiff to have more than his own anecdotal evidence in a case such as this where the cause of a medical condition, alopecia universalis, is an issue. The chambers judge distinguished the cases cited by the defendant including **McNeil v. Bethune**, **Maslen v. Chishlom**, [2003] O.J. No. 3960, **Claus v. Wolfman**, [1999] O.J. No. 5023, apparently because they were medical malpractice suits where the defendant's standard of care was in issue. Causation was the issue in **McNeil v. Bethune**, see ¶ 26 and **Claus v. Wolfman**, see: ¶ 21. The standard of care is an issue in this case as well. The defendant has not admitted a breach of the standard of care. However the defendant's application was brought solely on the basis that the plaintiff has no evidence to prove causation, one of the other elements of the tort that the plaintiff would be required to prove at trial.

[23] The point is, that in order to find causation, in this case, the trier of fact will need the assistance of an expert. What causes a medical condition is a scientific matter and outside the experience and knowledge of a judge or jury. See **R. v. Abbey**, [1982] 2 S.C.R. 24, page 42. This case is not like a situation where a scalpel is left in a patient after an operation in which a lay person could determine causation of the patient's subsequent injuries. I agree with the following statements from **Claus v. Wolfman** and find that they are applicable to this case:

> 4 It seems to me that on the authority of the cases following, unless this is a case where the issues to be decided are within the ordinary knowledge and experience of the trier of fact (a position not vigorously advanced by the plaintiffs), the motion must succeed, as the plaintiffs will be unable to prove at a trial that the defendants were negligent. [case citations omitted]
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> 20 Admittedly in Snell v. Farrell, supra, at pages 328-329, the Supreme Court of Canada observed that "[i]n many malpractice cases, the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary." However, here

> the plaintiffs have not provided even the "little affirmative evidence" and, what is more, the defendants have provided "evidence to the contrary."
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> 21 The right of the trier of fact to draw the inference that the proximity in time of the defendants' treatment to the injury suffered by the plaintiff Elizabeth Claus may be indicative of some causal connection is not impaired by the failure of a medical expert to testify that the injury was definitely caused by the treatment nor by the existence of other potential causes. However, there must [b]e some medical testimony, no matter how tentative, proffered to support the inference.

See also **Fitzpatrick Estate v. Medtronic Inc.**, [1998] O.J. 517 ¶ 36-38.

[24] Another case referred to by the defendant, **Trueman v. Ripley**, [1998] B.C.J. No. 2060, was distinguished by the learned chambers judge because it was a summary trial as opposed to a summary judgment application. That case, however, supports the defendant's submission that in a pharmaceutical product liability case, causation cannot be proved on the basis only of a temporal relationship as Mr. Cherny purports to do in this case. I agree with the rationale of Justice Martinson:

> 33 Dr. Rothschild said that anecdotal reports show only a temporal relationship of the drug with a particular event, not a causal relationship, and can only form the hypothesis for clinical or epidemiological testing, which is then required to form a causal link. He said that it is generally accepted by the medical and scientific communities that anecdotal reports cannot be used to draw inferences about a causal link between an adverse medical event and a drug and that the Food and Drug Administration and the World Health Organization specifically caution against such conclusions.
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> 34 Such reports, he said, are not considered by the medical and scientific communities to be reliable because of the uncontrolled nature of such reports and the possibility that an adverse medical event may be related to the patient's underlying disease, another medication, significant events occurring in the patient's life, or may be the result of chance. ...
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> 61 I accept the opinion of Dr. Rothschild that anecdotal accounts cannot form the basis of a scientific conclusion that a drug causes certain side effects. I was referred to a case in the United States District Court, Central District of California, where the court considered a law suit in which a person claimed that ingestion of Halcion caused him to strangle his wife. Causation was the issue. The Court accepted the evidence of Dr. Rothschild that reliance on anecdotal data "is not an acceptable method in the scientific community to prove causation": Snyder v. The Upjohn Co. Inc. (May 20, 1997), No. CV 94-1826-GHK (AJWx) at p. 8. In

> that case a motion for summary judgment was granted and the case was dismissed.

[25] The chambers judge found that it was not necessary for Mr. Cherny to present expert evidence to prove that the Zyban caused his alopecia universalis and that the jury should be able to assess the weight they are prepared to give his credibility and anecdotal evidence on the issue of causation. This was, with respect, an error in principle. Although expert evidence is not required in every case where causation is in issue, on the undisputed facts of this case, without expert evidence to support the plaintiff's claim of causation, there is no genuine issue for trial. Therefore the summary judgment application should have been granted.

[26] I would therefore allow the appeal with costs payable to the appellant in the amount of $3000 which includes the costs for the Supreme Court chambers application and disbursements.

Roscoe, J.A.

Concurring:

Oland, J.A.

Hamilton, J.A.