IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Cherny v. Glaxo Smith Kline Inc., 2008 NSSC 345

Date: 2008/11/19
Docket: S. H. No. 201450
Registry: Halifax

Between:

VLADIMIR CHERNY

Plaintiff

and

GLAXO SMITH KLINE INC., a body corporate

Defendant

Judge: Justice Charles E. Haliburton

Heard: November 13, 2008, in Halifax, Nova Scotia

Counsel: Kevin P. Downie, Gavin Giles,Q.C. and Wylie Spicer, Q.C.
Solicitors for the Plaintiff

Teresa J. Walsh and Gordon F. Proudfoot, Q.C.
Solicitors for the Defendant

By the Court:

[1] The Defendant brings this Application under *Rule 13.01* of the *Civil Procedure Rules* seeking an Order of Summary Judgment.

The Facts

[2] The Plaintiff, Vladimir Cherny, obtained a prescription from his family doctor for a drug marketed by the Defendant, under the name Zyban. The Defendant markets the drug as an aid to "quit" smoking. It was Mr. Cherny's desire to terminate his smoking habit and he had seen advertisements indicating that this drug would assist him toward that end. He approached his family doctor with that in mind and as a result obtained a prescription and used the drug for a period of three weeks. The position of his counsel, on this application, is that at the end of the three weeks he rapidly lost all the hair on his body. This is a condition known as *alopecia universalis*. The Plaintiff claims that this was an undisclosed side effect of taking the drug. The loss of hair is the main thrust of this lawsuit. It should be added, however, that Mr. Cherny claims to have suffered

other side effects including depression and exaggerated libido. I understand the drug trials undertaken in connection with Zyban disclosed a certain incidence of depression and/or irritability and increased libido, but; at least as of the time when Cherny was prescribed the drug; hair loss (*alopecia)* had not been reported as a possible side effect. In subsequent publications, it did appear in the monograph published for the drug.

[3] As I understand trials are conducted with respect to the effects of consumption of various medications and the positive and adverse effects are noted and as a result of consistent results using a broad enough sampling, the curative effects as well as the adverse effects are noted and categorized. After a drug is marketed, adverse or other effects are noted and when reported are the subject of revisions in the monograph published for that drug so that the medical community may become aware. Cherny was prescribed this medication in late 1999. The following year, "*alopecia"* showed up as one of the possible adverse effects in the monograph published for the drug. The active agent is "bupropion". Bupropion is also the active ingredient in Wellbutrin, manufactured by the Defendant and Wellbutrin likewise has been connected with some incidence of hair loss.

[4] The connection between the consumption of the drug and hair loss or *alopecia* is anecdotal. No scientific clinical trials have established a connection. In this circumstance at the intended trial, there will be no opinion offered from a qualified expert to establish that the consumption of Zyban is the cause of Cherny's hair loss. The evidence will be his own and that of other lay persons who may have some knowledge of his circumstances and it will be anecdotal.

[5] It is the position of the Applicant that the lack of expert evidence demonstrating the causal connection between the ingestion of the drug and the consequence of *alopecia* is fatal to the case of the Plaintiff as a matter of law.

[6] I am told that the weight of medical evidence is *alopecia* is an auto immune disorder which Mr. Cherny suffered in some degree previous to taking the medication, that the only connection between his condition and the consumption of the drug is temporal, and that this is insufficient to establish the causal link in the absence of expert testimony.

[7] This proposition I am not able to accept.

What is the Law?

[8] The relevant provision of our *Civil Procedure Rule 13.01* provides that after the close of pleadings any party may apply to the Court for judgment on the ground that:

(a) **There is no arguable issue to be tried with respect to the claim or any part thereof**; ...

[9] The test for such an application I understand to have been properly stated in *Selig v. Cook's Oil Company Ltd.*, 2005 NSCA 36, 137 A.C.W.S. (3d) 561. There are two distinct parts of the test and they should be dealt with sequentially:

> [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.

> [19] If the applicant does not establish that there is no genuine issue of fact, it is not necessary to go to the second step. There is no onus on the responding party if the applicant does not succeed on the first prong of the test. If there are genuine issues of fact, the application should be dismissed.

[10] It is fair to say that the cases dealing with this provision agree that if the anticipated evidence will require a determination as to credibility, then it is not an appropriate case for summary judgment. Put another way, if the facts alleged when proven, will underpin a cause of action, then the Plaintiff would be entitled to his trial. In the recent case of *Bowden v. Withrow's Pharmacy Halifax (1999) Ltd.,* [2008] N.S.J. 360, Beveridge, J. reviewed these provisions and quoted from *Williston and Rolls,* at paragraph 11 of that decision:

> In every jury case, the legal question to be determined is whether any facts have been established by the plaintiff from which liability, if is an issue, may be inferred, but it still remains for the jury to say whether, from those facts, liability ought to be inferred. If that standard has been met, the case must go to the jury. In ruling on the defendant's motion, the judge is deciding a question of law and his decision is therefore subject to review on appeal.

[11] At paragraph 12 Beveridge, J. goes on to quote from Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (2ed.):

> An important part of the division of responsibilities between judge and jury is the assessment of the sufficiency of the evidence adduced by a party. If a plaintiff fails to lead any material evidence, the plaintiff may be faced with a defendant's non-suit motion at the close of his or her case. If such a motion is launched, it is the trial judge's function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, may be inferred. In comparison, it is the trier of fact's duty to say at the end of the case whether liability ought to be inferred.

[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.

[13] A number of cases have been cited by the Applicant/Defendant in support of the proposition that expert opinion will be necessary to establish the Plaintiff's case or the "causal connection". I will refer to a number of those cases briefly but I observe that each of them involve medical malpractice issues where the appropriate "standard of care" is the defining issue. In *MacNeil v. Bethune* (2006) N.S.J. No. 62, an action was taken on behalf of a severely disabled child suffering from cerebral palsy among other things. Problems had arisen during childbirth and it was claimed that those problems had caused the child's condition at the time of the application to strike the pleadings and grant summary judgement. The applications Judge stated at paragraph 24:

> Unfortunately, the plaintiff's own expert reports on their face do not support the allegations of negligence, breach of professional duty and standard of care or

> causation. Quite the contrary, there is nothing in these reports to suggest any negligence on the part of the defendant doctors or the defendant hospital.

and at paragraph 26:

> The plaintiff must be in a position to put forward at least some specific information to show that had a certain procedure or course of treatment been administered properly or had some other procedure, course of treatment or series of tests been followed, that the outcome of the plaintiff's condition might have been different.

and finally at paragraph 34:

> After a review of all of the materials that are before me I find there is no arguable issue to be tried with respect to this claim. This claim has virtually no chance of success. The defendant's application for summary judgment is granted pursuant to C.P.R. 13.01. The action is dismissed.

[14] For the reasons already stated, it is my view that this case can be distinguished. There, the child suffered multiple deficits of a complex nature. The mother had become ill during pregnancy and required hospitalization and treatment and there was apparently fetal distress. The defendant physicians were to testify to the effect that they had ordered all tests and performed all investigations that were appropriate and that the condition of the child at birth was not caused by any

negligence on their part. The plaintiffs were unable to produce any professional evidence to the contrary.

[15] An Ontario decision *Maslen v. Chishlom* [2003] O.J. No. 3960 reports an application under a similar provision of the Rules in Ontario. It is again a medical malpractice suit in which the applicant quotes paragraph 8 and 9:

> When presented at a trial with the opinion of two expert physicians that the defendant physician's conduct was not a causal factor in the plaintiff's jury, and the defendant physicians met the standard of care required of them by their peers, the judge (no matter how sympathetic he or she no doubt will be) will not accept the uninformed opinion of the lay plaintiff, even if bolstered by the plaintiff's interpretation of the medical texts.
>
> Indeed, even if the absence of the defence medicals, I doubt that the plaintiff can meet the burden of proof that all plaintiffs, even those involved in medical negligence cases, must meet, without himself adducing expert medical testimony.

[16] Further another Ontario case dealing again with a medical malpractice action, indeed decided by the same Judge *Claus v. Wolfman* [1999] O.J. No. 5023 is quoted by the Applicant at paragraph 12:

> In my view, it would therefore be open to a court to grant a summary judgment dismissing a claim of this nature even without the expert opinion of the defendants. The court ought not to be asked to make a finding that an expert or experts (the defendants) failed to meet the standard required of them by their professional peers and that their malpractice was the cause or a significant

> causative factor in the plaintiff's injury, in the absence of evidence of what the standard is and without the expression of even a guarded professional opinion that the defendants' conduct may have been a causal factor.

[17] A case from British Columbia was cited which involved an action against a drug company. That is *Trueman v. Ripley* [19998] B.C.J. No. 2060. In that case action was taken against medical doctors for professional malpractice and against the drug company Upjohn. The action against Upjohn was statute barred because of limitation. At paragraphs 32, 33 and 34 of the case there is an interesting discussion about proving the causal link between a drug and an adverse effect and the quality of the evidence which will be relied upon by the medical and scientific communities as proof of the causal connection between a particular drug and a particular result. The procedure in this particular case taken under *Rule 18.A* of the B.C. Supreme Court Rules appears to have been a summary trial, so that evidence was taken, a circumstance somewhat different than in the present case. The nature of the discussion in the paragraphs quoted describes the kind of "hill" which Mr. Cherny must climb in order to prove his case. It is said quoting from paragraph 32 that:

> ... there are only two methodologies generally accepted by the medical and scientific communities with respect to drawing the conclusion that the ingestion of a drug may cause an adverse medical event:

a. controlled clinical studies where subjects are given a drug in a controlled setting and the drug is compared with other drugs or placebo; and

b. epidemiological studies, where defined human populations, including those who have already been prescribed the drug, are studied.

The authority goes on to say that spontaneous reporting of adverse results and/or instances where doctors have reported observations of adverse effects are only anecdotal and can only form the hypothesis for clinical testing which testing is then required to form a causal link.

[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 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*.

[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.

[20] The Application for summary judgement is denied with costs in the cause.

J.