

SUPREME COURT OF NOVA SCOTIA

Citation: *Sweetland v. GlaxoSmithKline Inc.*, 2016 NSSC 139

Date: 20160601

Docket: Hfx No. 315567

Registry: Halifax

Between:

Albert Carl Sweetland and Mary Patricia Addicott-Andrews

Plaintiffs

v.

GlaxoSmithKline Inc. and GlaxoSmithKline LLC

Defendants

SUPPLEMENTAL CERTIFICATION DECISION

Judge: The Honourable Justice Michael J. Wood

Heard: September 15-18, 2015, in Halifax, Nova Scotia

**Final Written
Submissions:** May 13, 2016

Counsel: Raymond F. Wagner, Q.C., Michael Dull, and Madeline Carter
for the Plaintiffs

Scott R. Campbell, Mary M. Thomson, and Josh Hanet for the
Defendants

By the Court:

[1] On January 15, 2016, I issued my decision on the certification motion in this proceeding (2016 NSSC 18). In it I noted certain deficiencies in the plaintiffs' evidence with respect to the certification criteria requiring an identifiable class of two or more persons. Rather than dismiss the motion I granted the plaintiffs leave to file supplemental evidence on this issue.

[2] In my January decision I also invited the plaintiffs to redraft their list of common issues to reflect my concerns with respect to what had been initially proposed.

[3] Counsel for the plaintiffs filed a revised list of common issues as well as five affidavits. There were two affidavits from individuals who were prescribed Avandia and wished to pursue their claims against the defendants in this proposed class proceeding. There were two additional affidavits from spouses of deceased individuals who had been prescribed Avandia and wished to have their claims against the defendants litigated in this proceeding. All four of the affidavits included statements that the individuals who were prescribed and took Avandia were diagnosed with congestive heart failure, heart attack, or stroke.

[4] The fifth affidavit filed by counsel for the plaintiffs was from Richard Crossman, a paralegal employed with the plaintiffs' law firm. It indicated that Mr. Crossman had provided questionnaires to potential class members who had expressed an interest in pursuing the class action and that 71 completed forms were received.

[5] The defendants objected to all of the affidavits. The complaint about the four potential class members was the reference to suffering congestive heart failure, heart attack, or stroke, which evidence was said to be irrelevant and prejudicial. I agree with the defendants. The proposed classes are limited to persons who purchased and ingested the drug Avandia and families of deceased class members. The class definition makes no reference to suffering heart failure, heart attack, or stroke and, therefore, such allegations are irrelevant to the question of certification. I ignored this evidence for purposes of this supplemental decision. I do not think it is necessary to formally strike out the portions of the affidavits containing the offending comments.

[6] The objection to Mr. Crossman's affidavit is that it does not address the question of whether there are two or more members of each class who wish to have their claims resolved through the mechanism of a class proceeding. Once again, I agree with the defendants and have ignored Mr. Crossman's affidavit in its entirety.

[7] The only remaining objection by the defendants is that none of the four affidavits say that the individuals actually purchased Avandia, which is how the proposed class is defined. In each case, the affidavit states that Avandia was prescribed and taken. The defendants go on to suggest that the class should be redefined to refer to persons who have "been prescribed and ingested Avandia". This was not part of the defendants' submissions on the original certification motion and I will not entertain this new argument at this stage.

[8] I am satisfied that the evidence provided by the plaintiffs remedies the deficiencies noted in the initial certification decision and they have provided some evidence to establish the existence of two or more members of each class. I will leave it to counsel to discuss whether to adopt the proposed change in definition suggested by defence counsel as part of the process of finalizing the form of order.

[9] The defendants requested an order that the deponents produce medical histories in support of the allegations that they have suffered cardiovascular problems. No formal motion was made and, as I have already indicated, this evidence is irrelevant with respect to certification and so there is no reason to order its production.

[10] As part of their submissions the plaintiffs provided a revised common issues list addressing comments made in my initial certification decision. The only objection from the defendants was with respect to the new common issue five which reads as follows:

5. By virtue of unjust enrichment and/or waiver of tort, are the Defendants liable on a restitutionary basis:
 - (a) to account to any of the Classes, including provincial insurers which have subrogated claims, for any part of the proceeds of the sale of AVANDIA? Or, in the alternative,
 - (b) such that a constructive trust is to be imposed on any part of the gross revenue from the sale of AVANDIA for the benefit of the Classes, including the provincial insurers which have subrogated claims?

[11] I had concluded that entitlement and quantification of these claims should be dealt with separately and only entitlement should be considered as a common issue. The defendants' complaint is that the reformatted common issue does not go far enough because it continues to raise matters of quantification as well as specific remedies for class members. They argue that the common issue should read as follows:

Are the class members entitled to relief based on unjust enrichment or waiver of tort in the circumstances of this case?

[12] In my view the plaintiffs' revised common issue does not raise any issue of quantification and addresses my concerns with respect to the complexities of that question. Their proposal addresses two potential remedies and therefore is more focused than the general question suggested by the defendants. In my view it is the preferable approach to the issue.

[13] Having considered the supplemental evidence and submissions of both parties I am prepared to certify this proceeding as a class proceeding based upon the plaintiffs' revised list of common issues. As indicated in paragraph 110 in my initial certification decision, I expect to receive a revised litigation plan from the plaintiffs and will accept further submissions from counsel if there is any dispute with respect to that document.

Wood, J.