

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE  
JUSTICE CULLITY

)  
)  
)

June <sup>6</sup> 4, 2007



BETWEEN:

ANDREA HEWARD, ANDREW CHARLES HEWARD,  
KELLY HUTCHINS, DARLENE HUTCHINS,  
DANIEL WELLS and NANCY WELLS

Plaintiffs

- and -

ELI LILLY & COMPANY and ELI LILLY CANADA INC.

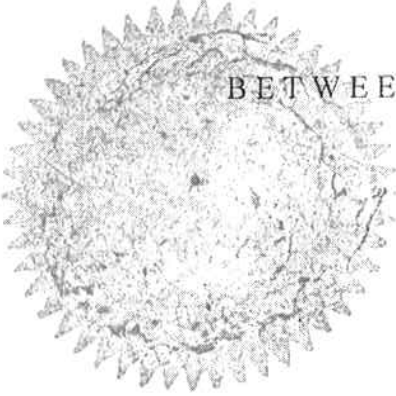
Defendants

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6

**ORDER**

THIS MOTION, made by the plaintiffs, for an order that this action be certified as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, was heard on November 22, 23, 24 and 27, 2006, at Toronto.

ON READING the affidavits of the various affiants and other material filed by the parties, and on hearing the submissions of counsel for the plaintiffs and the defendants,



1. THIS COURT ORDERS that the within proceeding be and is hereby certified as a class proceeding pursuant to the *Class Proceedings Act, 1992* S.O. 1992, c. 6.

2. THIS COURT ORDERS that the Class is defined as:

- (a) all persons resident in Canada (excluding British Columbia and Québec) who were prescribed and ingested the drug Zyprexa (generic name: olanzapine), at any time on or before the date of this order and which was manufactured, marketed and/or sold or otherwise placed into the stream of commerce in Canada by Eli Lilly & Company and/or Eli Lilly Canada Inc.; and
- (b) all persons resident in Canada who by virtue of a personal relationship to one or more of such persons described in (a) above with a valid claim, have standing in this action pursuant to s. 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended (or the applicable provincial statutory provisions set out in Schedule "A", as applicable) if the defendants' liability to persons described in (a) is established.

3. THIS COURT ORDERS that Andrea Heward, Andrew Charles Heward, Kelly Hutchins, Darlene Hutchins, Daniel Wells and Nancy Wells be and are hereby appointed as the representative plaintiffs in the within proceeding.

4. THIS COURT DECLARES that the nature of the claim asserted on behalf of the Class is a claim for damages or other monetary relief against the defendants for developing, manufacturing and selling a drug called Zyprexa (olanzapine), which the plaintiffs allege to be defective and to cause diabetes and related complaints.

5. THIS COURT ORDERS that the within proceeding be and is hereby certified on the basis of the following common issues:

- (a) can Zyprexa cause diabetes and/or related metabolic disturbances as well as secondary injuries flowing therefrom?
- (b) if the answer to (a) is yes, is Zyprexa thereby defective or unfit for the purpose for which it was intended (including usages that ought reasonably to have been foreseen by the defendants) as designed, developed, fabricated, manufactured, sold, imported, distributed, marketed or otherwise placed into the stream of commerce in Canada by one or both of the defendants?
- (c) did the defendants breach a duty of care owed to the Class by marketing and distributing Zyprexa in Canada?
- (d) did the defendants knowingly, recklessly or negligently breach a duty to warn or materially misrepresent any of the risks of harm from Zyprexa?
- (e) if one or more of common issues (a) through (d) are answered affirmatively, are Class members who are subsequently able to establish valid claims entitled to special damages for medical costs incurred in the screening, diagnosis and treatment of diseases related to Zyprexa?
- (f) should the defendants be required to implement a medical monitoring regime and, if so, what should that regime comprise and how should it be established?
- (g) should the defendants pay exemplary or punitive damages?

- (h) by virtue of waiver of tort, are the defendants liable on a restitutionary basis:
  - (i) to account to any of the Class, including the provincial insurers which have subrogated claims, on a restitutionary basis, for any part of the proceeds of the sale of Zyprexa? If so, in what amount and for whose benefit is such accounting to be made? Or, in the alternative,
  - (ii) such that a constructive trust is to be imposed on any part of the proceeds of sale of Zyprexa for the benefit of the Class, including the provincial insurers which have subrogated claims, and, if so, in what amount, and for whom are such proceeds held?

6. THIS COURT ORDERS that the notice of certification as a class proceeding, attached as Schedule "B" to this order, be approved.

7. THIS COURT ORDERS that the notice of certification be given to the Class by:

- (a) publishing the notice once in each of the national editions of *The Globe and Mail* and *The National Post*, and *The Canadian Medical Association Journal* and *Schizophrenia Digest*;
- (b) sending the notice to the following organizations:
  - (i) Schizophrenia Society of Canada;

- (ii) Schizophrenia Society of Alberta;
  - (iii) Schizophrenia Society Saskatchewan;
  - (iv) Manitoba Schizophrenia Society;
  - (v) Schizophrenia Society of Ontario;
  - (vi) Schizophrenia Society of New Brunswick;
  - (vii) Schizophrenia Society of Prince Edward Island;
  - (viii) Schizophrenia Society of Nova Scotia;
  - (ix) Schizophrenia Society of Newfoundland & Labrador;
  - (x) Canadian Mental Health Association;
  - (xi) Canadian Psychiatric Association;
  - (xii) Mood Disorders Society of Canada;
- (c) posting the notice on the following websites for at least 60 days: [www.classaction.ca](http://www.classaction.ca), [www.classproceedings.ca](http://www.classproceedings.ca) and [www.zyprexacanadianclassaction.ca](http://www.zyprexacanadianclassaction.ca);
- (d) sending the notices by mail to counsel for individuals pursuing independent litigation, if any, where those individuals are known to class counsel; and
- (e) sending the notice by mail to any person who requests it within 60 days after the latest date of publication in the above-noted newspapers.

8. THIS COURT ORDERS that members of the Class may opt out of the class proceeding by serving written notice of their decision to opt out of the proceeding

"and"



by forwarding same to the address set out in the notice. Notice of the decision to opt out must be received by the solicitors as set out in the notice within 60 days of the date of the latest date of publication of the notice in the above-noted newspapers.


9. THIS COURT ORDERS that the costs of all notices will be apportioned between and borne 50% by the plaintiffs and 50% by the defendants.

10. THIS COURT ORDERS that the defendants shall pay to the plaintiffs their costs of this motion fixed on a partial indemnity basis, plus GST.



ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO.:

JUN 06 2007

AS DOCUMENT NO.:  
À TITRE DE DOCUMENT NO.:  
PER / PAR: 

## SCHEDULE "A" - PROVINCIAL STATUTES RE FAMILY MEMBER CLAIMS

### Alberta

*Tort-feasors Act*, R.S.A. 2000 c. T-5

#### **Loss of consortium through injury**

2.1(1) When a person has, either intentionally or by neglect of some duty existing independently of contract, inflicted physical harm on a married person and thereby deprived the spouse of that married person of the society and comfort of that married person, the person who inflicted the physical harm is liable in an action for damages by the spouse or in respect of the deprivation.

2.1(2) The right of a spouse to bring the action referred to in subsection (1) is in addition to, and independent of, any right of action that the married person has, or any action that the spouse in the name of the married person has, for injury inflicted on the married person.

The *Domestic Relations Act*, R.S.A. 2000, c. D 10.5, was repealed by RSA 2003, c.F-4.5 [*Family Law Act*].

In addition the following Act applies:

*Fatal Accidents Act*, R.S.A. 2000, c. F-8,

**2. Action for damages.** When the death of a person has been caused by a wrongful act, neglect or default that would, if death had not ensued, have entitled the injured party to maintain an action and recover damages, in each case the person who would have been liable if death had not ensued is liable to an action for damages notwithstanding the death of the party injured.

#### **Persons entitled to benefits**

3(1) An action under this Act

(a) shall be for the benefit of the spouse, adult interdependent partner, parent, child, brother or sister of the person whose death has been so caused, and

(b) shall be brought by and in the name of the executor or administrator of the person deceased,

and in the action the court may give to the persons respectively for whose benefit the action has been brought those damages that the court considers appropriate to the injury resulting from the death.

3(2) If there is no executor or administrator, or if the executor or administrator does not bring the action within one year after the death of the party injured, then the action may be brought by and in the name of all or any of the persons for whose benefit the action would have been, if it had been brought by or in the name of the executor or administrator.

3(3) Every action so brought shall be for the benefit of the same persons and is as nearly as possible subject to the same regulations and procedure as if it were brought by and in the name of the executor or administrator.

#### **Damages for bereavement**

8(1) In this section,

(a) “child” means a son or daughter, whether legitimate or illegitimate;

(b) “parent” means a mother or father.

8(2) If an action is brought under this Act, the court, without reference to any other damages that

may be awarded and without evidence of damage, shall award damages for grief and loss of the guidance, care and companionship of the deceased person of

(a) subject to subsections (3) and (4), \$75 000 to the spouse or adult interdependent partner of the deceased person,

(b) \$75 000 to the parent or parents of the deceased person if the deceased person, at the time of death,

(i) was a minor, or

(ii) was not a minor but was unmarried and had no adult interdependent partner,



to be divided equally if the action is brought for the benefit of both parents, and

(c) \$45 000 to each child of the deceased person who, at the time of the death of the deceased person,

(i) is a minor, or

(ii) is not a minor but is unmarried and has no adult interdependent partner.

8(3) The court shall not award damages under subsection (2)(a) to the spouse or adult interdependent partner if the spouse or adult interdependent partner was living separate and apart from the deceased person at the time of death.

8(4) [Repealed 2002, c. A-4.5, s. 36(5)(c).]

8(5) A cause of action conferred on a person by subsection (2) does not, on the death of that person, survive for the benefit of the person's estate.

**Other Provinces: see the following Acts**

**Saskatchewan**

*Fatal Accidents Act*, R.S.S. 1978, c.F-11 as amended

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

**Manitoba**

*Fatal Accidents Act*, C.C.S.M. c. F50, as amended

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

**Newfoundland**

*Fatal Accidents Act*, R.S.N.L. 1990, c.F-6

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

**Nova Scotia**

*Fatal Injuries Act*, R.S.N.S. 1989, c.163, amended 2000 c.29, ss9-12

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

**PEI**

*Fatal Accidents Act*, R.S.P.E.I 1988, c.F-5, as amended

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

**New Brunswick**

*Fatal Accidents Act*, R.S.N.B. 1973, c.F-7

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

## **SCHEDULE "B"**

### **NOTICE OF CLASS CERTIFICATION**

#### **LEGAL NOTICE PURSUANT TO THE *CLASS PROCEEDINGS ACT, 1992, S.O. 1992, c. 6.***

#### **THE NATURE OF THE LAWSUIT**

A class action has been commenced in the Superior Court of Justice against Eli Lilly & Company and Eli Lilly Canada Inc. (the "defendants"). The proceedings have been brought by Andrea Heward, Andrew Charles Heward, Kelly Hutchins, Darlene Hutchins, Daniel Wells and Nancy Wells representative plaintiffs, by their solicitors, Siskinds LLP and Stevensons LLP.

Patients who have been prescribed Zyprexa should consult their physicians if they have any questions with respect to their medical condition and should not stop taking Zyprexa without consulting with their health care professional.

The representative plaintiffs claim damages or other monetary relief against the defendants for developing, manufacturing and selling a drug called Zyprexa (olanzapine), which the plaintiffs allege to be defective and to cause diabetes and related complaints.

The defendants deny the plaintiffs' allegations and have stated that they will defend the action and will deny any wrongdoing and liability for damages.

The court has not taken any position as to the likelihood of recovery on the part of any plaintiffs, or as to the truth or merits of the claims or defences asserted by either side. This notice is being provided because you may be a member of the Class whose rights may be affected by the lawsuit.

The allegations made by the plaintiffs have not been proven in court and should not be considered in any way to be medical advice.

#### **THE CLASS**

By court order, the Class to which this lawsuit applies has been defined as follows:

- (a) all persons resident in Canada (excluding British Columbia and Québec) who were prescribed and ingested the drug Zyprexa (generic name: olanzapine), at any time on or before June 1, 2007 and which was manufactured, marketed and/or sold or otherwise placed into the stream of commerce in Canada by Eli Lilly & Company and/or Eli Lilly Canada Inc.; and

- (b) all persons resident in Canada who by virtue of a personal relationship to one or more of such persons described in (a) above with a valid claim, have standing in this action pursuant to s. 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended (or the applicable provincial statutory provisions set out in Schedule "A" of the order, as applicable) if the defendants' liability to persons described in (a) is established.

## THE COMMON ISSUES

At present the class action will determine the following issues:

- (a) can Zyprexa cause diabetes and/or related metabolic disturbances as well as secondary injuries flowing therefrom?
- (b) if the answer to (a) is yes, is Zyprexa thereby defective or unfit for the purpose for which it was intended (including usages that ought reasonably to have been foreseen by the defendants) as designed, developed, fabricated, manufactured, sold, imported, distributed, marketed or otherwise placed into the stream of commerce in Canada by one or both of the defendants?
- (c) did the defendants breach a duty of care owed to the Class by marketing and distributing Zyprexa in Canada?
- (d) did the defendants knowingly, recklessly or negligently breach a duty to warn or materially misrepresent any of the risks of harm from Zyprexa?
- (e) if any one or more of common issues (a) through (d) are answered affirmatively, are Class members who are subsequently able to establish valid claims entitled to special damages for medical costs incurred in the screening, diagnosis and treatment of diseases related to Zyprexa?
- (f) should the defendants be required to implement a medical monitoring regime and, if so, what should that regime comprise and how should it be established?
- (g) should the defendants pay exemplary or punitive damages?
- (h) by virtue of waiver of tort, are the defendants liable on a restitutionary basis:
  - (i) to account to any of the Class, including the provincial insurers which have subrogated claims, on a restitutionary basis, for any part of the proceeds of the sale of Zyprexa? If so, in what amount and for whose benefit is such account to be made? Or, in the alternative,
  - (ii) such that a constructive trust is to be imposed on the proceeds of sale of Zyprexa for the benefit of the Class, including the provincial insurers which have subrogated claims, and, if so, in what amount, and for whom are such proceeds held?

Following a determination of the common issues, further stages of litigation may be required. Stage 2, only if necessary, will involve determining the issue of liability on an individual basis. Stage 3, again only if necessary, will involve the assessment of damages on an individual basis unless damages are assessed on an aggregate basis at the same time or after the common issues are determined.

## **PARTICIPATION AND EXCLUSION FROM THE CLASS**

If you wish to remain a member of the Class, you do not have to do anything at this time. If you wish to obtain more information about your rights as a Class member you may contact the solicitors for the representative plaintiffs, Siskinds LLP and Stevensons LLP, in writing at the addresses below.

**IF YOU WISH TO EXCLUDE YOURSELF FROM THE CLASS PROCEEDING** (“opt out”) you must deliver a written notice to one of the solicitors for the parties (at the addresses listed below) specifying your desire to opt out of the class proceeding. Notice of your decision to opt out must be received by either one of the solicitors below within 60 days of the date of this notice.

**ANY JUDGMENT OBTAINED ON THE COMMON ISSUES IN THIS ACTION, WHETHER FAVOURABLE OR NOT, WILL BIND ALL CLASS MEMBERS WHO DO NOT OPT OUT OF THIS ACTION.**

## **FINANCIAL CONSEQUENCES**

The class proceeding shall deal with the common issues, as outlined above. No Class member, other than the representative plaintiffs, will be liable for costs with respect to the determination of these common issues. However, once the court has determined the common issues it may be necessary that the individual members of the Class participate in individual proceedings to determine issues which are not common to the Class in order to establish their claim. If this is necessary, each member of the Class may have to bear costs of such individual proceedings and, if unsuccessful, could be liable to pay a portion of the defendants’ costs incurred with respect to such individual proceedings.

*who chooses to participate*  
*Me*

Class members may be entitled to receive financial compensation from the defendants if the class action is successful.

The representative plaintiffs have entered into an agreement with their solicitors whereby fees and disbursements related to the trial of the common issues will be payable only in the event of success in the class action. Any fees charged by the solicitors for the representative plaintiffs must be approved by the court.

For further information, please contact either:

Michael Eizenga  
Siskinds LLP  
680 Waterloo Street  
London, Ontario  
N6A 3V8  
1-519-672-2121 x 332  
[mike.eizenga@siskinds.com](mailto:mike.eizenga@siskinds.com)

Colin P. Stevenson  
Stevensons LLP  
144 Front Street West  
Suite 400  
Toronto, Ontario  
M5J 2L7  
416-599-7900 x 227  
[cstevenson@stevensonlaw.net](mailto:cstevenson@stevensonlaw.net)

In addition, information can be obtained from the website [www.classproceedings.ca](http://www.classproceedings.ca) under “current cases”, or [www.classaction.ca](http://www.classaction.ca) and [www.zyprexacanadianclassaction.ca](http://www.zyprexacanadianclassaction.ca).

To opt out of the proceeding, please write to one of the following:

Michael Eizenga of Siskinds LLP or Colin P. Stevenson of Stevensons LLP, one of the solicitors for the plaintiffs (details above),

or,

David S. Morritt  
Osler, Hoskin & Harcourt LLP  
1 First Canadian Place  
P.O. Box 50  
Toronto, Ontario  
M5X 1B8

Solicitors for the defendants

**HEWARD AND OTHERS**

and

**ELI LILLY & COMPANY AND OTHERS**

Plaintiffs

Defendants

**Court file no. 05-CV-283309CP**

(Short title of proceeding)

**ONTARIO  
SUPERIOR COURT OF JUSTICE**  
Proceeding commenced at Toronto

**ORDER**

**SISKINDS LLP**

Barristers & Solicitors  
680 Waterloo Street  
P.O. Box 2520  
London, Ontario  
N6A 3V8

Michael A. Eizenga  
LSUC #31470T  
Michael J. Peerless  
LSUC #34127P  
1-519-672-2121  
1-519-672-6065 (fax)

**STEVENSONS LLP**

Barristers  
144 Front Street West  
Suite 400  
Toronto, Ontario  
M5J 2L7

Colin P. Stevenson  
LSUC #28260A  
416-599-7900  
416-599-7910 (fax)  
Harvin D. Pitch (counsel)  
LSUC #12101P  
416-865-5310  
416-365-7702 (fax)

Solicitors for the plaintiffs