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Re: **Lilly et al vs. Heward et al.**

Date: **July 10, 2007**

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Pages including cover: 13

Please find attached the endorsement of Mr. Justice Lederman dated the 10th day of July 2007, for the above noted appeal heard by him on June 13, 2007.

COURT FILE NO.: 181/07
DATE: 20070710

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
ANDREA HEWARD, ANDREW CHARLES HEWARD, KELLY HUTCHINS, DARLENE HUTCHINS, DANIEL WELLS and NANCY WELLS	*Harvin D. Pitch, Colin Stevenson* and *Michael A. Eizenga* for the Plaintiffs / Respondents
Plaintiffs / Respondents	
- and -	
ELI LILLY & COMPANY and ELI LILLY CANADA INC.	*David S. Morritt, Sonia L. Bjorkquist*, and *Craig T. Lockwood*, for the Defendants / Moving Parties
Defendants / Moving Parties	
	HEARD at Toronto: June 13, 2007

REASONS FOR DECISION

LEDERMAN J.:

Overview

[1] On February 6, 2007, Cullity J. certified a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "CPA") against the defendants Eli Lilly & Company and Eli Lilly Canada Inc. (collectively "Eli Lilly"). Eli Lilly has brought this motion seeking leave to appeal certain aspects of Cullity J.'s decision to the Divisional Court.

[2] For the reasons that follow, the motion for leave to appeal is allowed in part.

Background

[3] The class action is in respect of the drug Zyprexa, an antipsychotic medication manufactured and distributed by Eli Lilly. The plaintiffs claim that Zyprexa causes

diabetes and "related complaints" and is therefore a defective drug or is unfit for its intended purpose.

[4] The class includes every person in Canada (other than residents of Quebec and British Columbia) who has taken Zyprexa up to the date of the certification order (June 6, 2007), and includes those persons who have derivative claims under the *Family Law Act* R.S.O. 1990, c. F.3 (or equivalent legislation) by virtue of their personal relationship to a person who has taken Zyprexa.

[5] Cullity J. certified two causes of action – the first in negligence and the second in "waiver of tort". It is the latter cause of action that forms the basis of much of Eli Lilly's motion for leave to appeal.

Issues

[6] Eli Lilly seeks leave to appeal various aspects of the certification order, alleging that Cullity J. erred in the following ways:

1. In concluding the statement of claim disclosed a cause of action for waiver of tort (CPA s. 5 (1) (a)).

2. In concluding that there is an identifiable class (CPA s. 5 (1) (b)).

3. In concluding that there is a common issue relating to the claim for waiver of tort (CPA s. 5 (1) (c)).

4. In concluding that a class proceeding was the preferable procedure (CPA s. 5 (1) (d)).

5. In concluding that the plaintiffs had provided an adequate litigation plan (CPA s. 5 (1) (e) (ii)).

[7] The test for leave is set out in r. 62.02 (4) (a) and (b), which says:

> 62.02 (4) Leave to appeal shall not be granted unless,
>
> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
>
> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

Analysis

i. Waiver of tort

[8] Cullity J. concluded that it was not plain and obvious that the plaintiffs' claim for waiver of tort would fail. I do not have reason to doubt the correctness of this conclusion. The majority of the Divisional Court came to the same conclusion in *Serhan Estate v. Johnson & Johnson* (2006), 269 D.L.R. (4th) 279 (Ont. Div. Ct.), leave to appeal to S.C.C. ref'd, [2006] S.C.C.A. No. 494.

[9] Counsel for Eli Lilly made much of the fact that in *Serhan* the wrongful conduct alleged to provide the basis for the waiver of tort claim was conspiracy, whereas in this case the wrongful conduct is grounded in negligence. Counsel pointed to Epstein J.'s treatment in *Serhan* of *Reid v. Ford Motor Co.*, [2006] B.C.J. No. 993 (S.C.). In *Reid*, Gerow J. said it was plain and obvious that waiver of tort is not sustainable in negligence. For the majority in *Serhan*, Epstein J. said at para. 66, "There are several factors that make *Reid* distinguishable, not the least of which is that the claim is framed in negligence, unlike the case at bar...Gerow J. recognised the significance of the fact that the matter before her was founded in negligence." Counsel for Eli Lilly suggests that these words reflect Epstein J.'s endorsement of the approach taken in *Reid*, and therefore there is good reason to doubt the correctness of Cullity J.'s decision.

[10] I cannot agree with this submission, for two reasons. First, I do not read Epstein J.'s comments as an endorsement. They are neutral. They neither affirm nor reject Gerow J.'s approach in *Reid*. Second, at paras. 45 to 69 of the majority reasons, Epstein J. described in detail the academic and juristic debate over whether waiver of tort is a cause of action independent of any tort or whether it is a "parasitic" remedy available only with certain underlying torts (I note the latter approach was implicitly accepted by Gerow J. in *Reid*). Epstein J. did not attempt to resolve this debate. She noted the conflicting opinions on the validity of recognizing a restitutionary cause of action absent unjust enrichment. And she acknowledged the concerns regarding the consequences of recognizing waiver of tort as a cause of action that does not require proof of loss. But Epstein J. explicitly concluded that these were matters of policy that should not be decided at the pleadings stage, relying on the test set out by the Court of Appeal in *Anger v. Berkshire Investment Group Inc.*, [2001] O.J. No. 379 (C.A.) at paras. 14-15 (see *Serhan* at para. 43).

[11] *Serhan* is currently the only appellate authority that addresses the waiver of tort issue raised by Eli Lilly. It was not plain and obvious in *Serhan* that the waiver of tort claim would fail, and the majority held that the policy issues regarding the nature and scope of waiver of tort, including whether it is an independent cause of action or a remedy for certain torts, were to be resolved in the context of a full record after trial. Cullity J.'s decision on this issue is consistent with *Serhan*. I therefore have no reason to doubt its correctness. As a result nothing more need be said regarding the test for leave in r. 62.02 (4) (b).

[12] This does not end the analysis. Counsel for Eli Lilly also says leave to appeal should be granted pursuant to r. 62.02 (4) (a). I accept there are decisions that conflict with Cullity J.'s decision. It is obvious that the *Reid* decision conflicts with Cullity J.'s decision. There is also the case of *Zidaric v. Toshiba of Canada Ltd.*, [2000] O.J. No. 4590 (S.C.J.). Like Gerow J. in *Reid*, Cumming J. held at para. 14 that waiver of tort is unavailable absent unjust enrichment. This conflicts with Cullity J.'s conclusion at paras. 37-8 of his reasons that it is not plain and obvious that the three-part test for unjust enrichment from *Pettkus v. Becker*, [1980] 2 S.C.R. 834 must be satisfied to ground a claim in waiver of tort.

[13] While there are conflicting decisions, in my opinion it is not desirable that leave to appeal be granted on this issue. It must be remembered that the conflict in the cases is over whether it is plain and obvious that a claim for waiver of tort is available only with certain underlying torts, or whether it is necessary to prove unjust enrichment and/or proof of loss. The Divisional Court has already addressed this issue in *Serhan* and has concluded that the plain and obvious test is not satisfied and these policy issues must be resolved on the basis of a full record after trial. Thus the conflict on this issue is between the Divisional Court (an appellate court) and certain judges of the Superior Courts in British Columbia and Ontario. As stated by Zuber J. in *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 129 D.L.R. (4th) 110 (Ont. Gen. Div.), at 111-12, "In my respectful view rule 62.02(4) does not apply to this kind of conflict, i.e., conflict between a single judge and that of an appellate court."

[14] Leave to appeal this aspect of Cullity J.'s decision is therefore dismissed.

ii. Identifiable class

[15] As mentioned above, Cullity J. certified a class that includes every person in Canada (other than residents of Quebec and British Columbia) who has taken Zyprexa up to the date of the certification order (June 6, 2007), and includes those persons who have derivative claims under the *Family Law Act* or equivalent legislation.

[16] The moving party's objection is that the class is unnecessarily broad because it includes individuals who can never have a claim against Eli Lilly (e.g. those who have stopped taking Zyprexa, who had diabetes before taking Zyprexa, and who never develop diabetes after taking Zyprexa).

[17] I do not accept this submission. Cullity J. cited both the Supreme Court of Canada in *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158 at para. 21 and the Court of Appeal in *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 45 for the proposition that the inclusion of persons in the class that ultimately have no claim is not fatal for the purposes of certification. *Cloud* also says that a class definition must not be too narrow so as to arbitrarily exclude persons who would otherwise have a claim.

[18] If waiver of tort does not require proof of loss the class is certainly not overly broad. To limit the class to those who have diabetes would arbitrarily exclude those persons who have claims for advance medical monitoring and waiver of tort. To limit the class to those with diabetes that was caused by Zyprexa would make class membership conditional on the merits of the action, contrary to *Hollick, supra* at para. 17. Consequently I do not have good reason to doubt the correctness of Cullity J.'s decision on this issue.

[19] Counsel for Eli Lilly says the decision in *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.) conflicts with Cullity J.'s decision. Assuming without deciding that this is true, *Nantais, supra*, says it would not be desirable to grant leave to appeal since the conflict is between the single judge in *Mouhteros* and the principles established by the Supreme Court and Court of Appeal as applied by Cullity J.

[20] Leave to appeal on this issue is therefore dismissed.

iii. Common issue arising from waiver of tort

[21] Eli Lilly challenges the following common issue certified by Cullity J.:

> 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 an 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?

[22] Eli Lilly says there is good reason to doubt the correctness of Cullity J.'s decision to certify the above as a common issue. Based on Eli Lilly's argument, I identify two principal submissions on this point. First, counsel submitted that the plaintiffs did not plead that they received nothing of value or that they incurred a loss by paying for Zyprexa. Second, counsel said there was no evidence to suggest that class members would not have taken Zyprexa if warnings about the risks associated with ingesting the drug were different. They point out that Zyprexa continues to this day to be prescribed for patients. Since warnings about Zyprexa use changed over time, counsel suggests that each individual member of the class would have to be examined to determine whether they would have stopped taking Zyprexa if different information were available. Eli Lilly says there is no evidence of how a court could determine the portion of profits to be disgorged and how those funds would be apportioned among class members.

[23] I do not accept Eli Lilly's first submission. As explained in *Serhan* and in Cullity J.'s reasons in this case, it is possible that waiver of tort does not require proof of loss or damages. In light of this, Eli Lilly's first submission regarding the absence of evidence of loss raises no issue of concern at all at this stage of the proceeding.

[24] However, Eli Lilly's second submission gives me reason to doubt the correctness of Cullity J.'s decision on this issue. Good reason to doubt the correctness of a decision does not mean that it is wrong or probably wrong. See *Hamilton C.A.S. v. CBC* (1994), 76 O.A.C. 215 (Gen. Div.) at 227; *Holt v. Anderson* (2005), 143 A.C.W.S. (3d) 121 (Ont. Div. Ct.). It is sufficient to show that the correctness of the order is open to very serious debate. See *Ash v. Lloyd's Corp.* (1992), 8 O.R. (3d) 282 (Gen. Div.) at 284.

[25] I must clarify that I do not take issue with entirety of the common issue formulated by Cullity J. Whether the remedies of an accounting and disgorgement and constructive trust are available in a waiver of tort claim is clearly a common legal issue. But in my view it is open to serious debate whether proof of the amount to be disgorged or held in a constructive trust is a common issue.

[26] While *Serhan* says entitlement to a remedy in waiver of tort may not require proof of loss, *Serhan* does not change the requirement that there be proof of a "wrongful gain" that will be subject to disgorgement or a constructive trust. Generally speaking, a gain is a "wrongful gain" only if it is attained through "wrongful conduct"; i.e. the wrongful conduct must cause the gain. Consequently, for the amount subject to disgorgement and construtive trust to be a common issue in this class action, the pleadings and evidence must demonstrate a way to prove on a class-wide basis that the alleged wrongful conduct (i.e "the failure to warn") caused the gain (i.e. "proceeds from Zyprexa sales").

[27] At para. 101 of his reasons Cullity J. said,

> The finding that a cause of action based on waiver of tort has been disclosed in the pleading is not in itself sufficient to qualify it as a common issue. In particular, the court must be satisfied that it is possible to determine on a class-wide basis whether a sufficient causal connection existed between the wrongful conduct and the amount for which the defendants could be ordered to account. (Emphasis added)

[28] Cullity J. was correct in stating there must be a causal connection on a class-wide basis between the gain subject to disgorgement or constructive trust and the wrongful conduct. It is Cullity J.'s conclusion that such a connection was disclosed that leads me to doubt the correctness of this aspect of his decision. Continuing at para. 101 of his reasons, Cullity J. explained how the necessary causal connection arose:

> Similarly, in this case, a necessary causal link between the wrong and the amount claimed by way of "restitution" or disgorgement would be established if the plaintiffs can prove their claim that the defendants were negligent in placing Zyprexa on the market, or in continuing to

> market it after November, 2001, without sufficient warning of its side-effects. In the event of a finding to this effect, the defendants would not have derived any proceeds but for their breach of duty and, in this sense, the proceeds would have resulted from the wrong.

[29] Cullity J. makes a significant assumption in this statement. To say with any confidence that Eli Lilly would not have derived proceeds from the sale of Zyprexa (the "gain") but for its failure to sufficiently warn of its side-effects (the "wrongful conduct"), the pleadings or evidence must, at the very least, support one of the following inferences: (1) the class members would not have agreed to take Zyprexa if properly warned of the risks associated with the drug, or (2) Zyprexa would not have been approved for sale if Health Canada was properly warned of the risks associated with the drug. Absent these inferences, it seems the only way to determine the amount for which the defendants could be ordered to account in waiver of tort is to investigate whether each member of the class would not have taken Zyprexa if properly warned. This is the antithesis of a common issue.

[30] This is not to say that such assumptions are always fatal to certifying a common issue. They are permissible if supported by sufficient evidence. The case of *Chadha v. Bayer* (2003), 63 O.R. (3d) 22 (C.A.) is illustrative of this point. That case involved a class action against manufacturers of iron oxide pigments used in bricks who allegedly engaged in a price-fixing conspiracy that illegally increased the price of bricks. The class members were homeowners whose homes were built using bricks containing the defendants' iron oxide. The cause of action under the *Competition Act* required the class to prove actual loss. The representative plaintiffs alleged the class suffered loss by paying higher prices for their houses because they were built with the defendants' bricks.

[31] The Divisional Court and the Court of Appeal concluded that such a loss could not be proved on a class-wide basis. The motions judge had accepted the evidence of an expert that deposed "it would be possible to determine an over-all assessment of damages on the basis of the net gain realized by the defendants as a result of their allegedly unlawful agreement" (*Chadha*, *supra* at para. 27). But Feldman J.A. pointed out at para. 30, "The expert's models are based on the assumption of a full pass-through of the price increase of the iron oxide to the homebuyers. However, it is that assumption that is the very issue that the court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified as such" (Emphasis added). At paras. 40 and 46 of the decision Feldman J.A. held that there was insufficient evidence before the motion judge to support the expert's assumption.

[32] In this case, and with great respect, it is not clear to me that the pleadings or the evidence support the assumption made by Cullity J. that Eli Lilly's gain was caused by its wrongful conduct. While the pleadings explicitly say the primary plaintiffs would not have taken the drug if they had been informed of its alleged side-effects (see Cullity J.'s reasons at para. 47), neither the pleadings nor the evidence support the inference that all members of the class would have done the same. This is perhaps not surprising, given

that Zyprexa continues to be prescribed and used by persons, including class members, three years after Health Canada ordered Eli Lilly to issue warnings regarding the possible risk of developing diabetes when taking Zyprexa. There is also nothing in the pleadings or the evidence to support the inference that Zyprexa would not have been approved for sale if Health Canada was properly warned of its associated risks. And since Health Canada was in fact warned about the risks of Zyprexa use in late 2003 and has not ordered the drug off the market, it is difficult to infer that Health Canada would not have approved Zyprexa in the first place if it received these same warnings in the early 1990's.

[33] For these reasons I find there is good reason to doubt the correctness of Cullity J.'s decision to certify as a common issue the amount of the alleged wrongful gain that is subject to disgorgement and/or a constructive trust. In addition, I find that this issue raises a matter of public importance that justifies granting leave to appeal. In the context of a claim in waiver of tort, accounting and disgorgement and constructive trust remedies have the power to make defendants liable for truly enormous amounts of money. The ramifications of exposure to this type of liability will extend beyond the parties to affect not just the pharmaceutical industry as a whole, but also the securities market given that most pharmaceutical companies are publicly traded. It is therefore important for an appellate court to clarify the circumstances under which proof of the amount of the "wrongful gain" associated with these remedies is a truly common issue in a class proceeding.

[34] Leave to appeal this particular aspect of Cullity J.'s decision is therefore allowed.

iv. Preferable procedure

[35] I do not accept that Cullity J.'s decision on the issue of preferable procedure conflicts with other decisions. He applied the relevant principles set out by the Supreme Court of Canada and the Court of Appeal.

[36] Since the amount of the "wrongful gain" subject to an accounting and disgorgement or a constructive trust may not be a common issue, whether a class action is the preferable procedure for the waiver of tort claim is open to serious debate. It may be that the only way to determine the amount of the alleged wrongful gain is through individual assessments of class members after a common issues trial. Which members of the class would be entitled to recoup the wrongful gain, and in what amounts, would also need to be assessed individually. Whether these individual issues overwhelm the common issues related to the waiver of tort claim is an open question. For the same reasons given above, the resolution of this issue is a matter of public importance that should be fully canvassed and resolved by the Divisional Court on appeal.

[37] This conclusion does not necessarily mean there is reason to doubt Cullity J.'s decision that a class action is the preferable procedure for the negligence claim. Eli Lilly does not challenge the certification of this action in negligence, and does not challenge the seven other common issues unrelated to waiver of tort that were certified by Cullity J.

[38] At the certification motion, Eli Lilly submitted that the individual issues that remain after a common issues trial (most notably causation and damages) would overwhelm the common issues, and the resolution of the individual issues would be unmanageable given the sheer size of the class. Cullity J. disagreed. While he did note that many of the plaintiffs' objections might be beside the point if a remedy based on waiver of tort was accepted, Cullity J. expressly held that a class action would be preferable even if waiver of tort were not pleaded.

[39] In both its factum and in oral submissions at this hearing, Eli Lilly raised virtually the same arguments as it did before the motions judge. Counsel also submitted that Cullity J. erred by relying on the analysis of Cumming J. in *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.), leave to appeal to Div. Ct. ref'd, (2000), 52 O.R. (3d) 20 (Div. Ct.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 88 which counsel says is distinguishable.

[40] Determining whether a class action is the preferable procedure involves an exercise of judicial discretion. Assessing whether the individual issues overwhelm the common issues is a qualitative and not a quantitative exercise (*Cloud, supra* at paras. 85-7). Cullity J. identified and applied the appropriate legal principles. He held the resolution of the common issues would significantly advance the proceedings. He acknowledged that many individual issues would remain after a common issues trial, but found these issues could be adequately managed through the "extensive powers and discretion conferred on the court by section 25 of the CPA". He adopted Cumming J.'s comments in *Wilson* (also a product liability case) that a class action would promote both access to justice and judicial economy. He noted that certification would advance behaviour modification to an even greater extent than in *Wilson* because Zyprexa is still on the market. And he concluded that the distinguishing features of *Wilson* were not relevant for the purpose of assessing the preferable procedure. I have not been persuaded that there is any reason to doubt the correctness of Cullity J.'s analysis.

[41] Consequenlty, leave to appeal Cullity J.'s decision is allowed only on the issue of whether a class action is the preferable procedure for the waiver of tort claim.

v. Litigation plan

[42] I do not accept Eli Lilly's submission that there is reason to doubt the correctness of Cullity J.'s conclusion that the plaintiffs' litigation plan was adequate. Cullity J. noted "counsel should not be required to engage in a pointless exercise of attempting to predict how the litigation will unfold and then to provide in detail for every eventuality that might arise." If Eli Lilly is successful in the appeal to the Divisional Court, the waiver of tort issue may well disappear and only the negligence claim would remain. While Cullity J. did say the number and complexity of individual issues would likely decline if the plaintiffs elect restitutionary remedies, it is clear from his reasons that he felt the litigation plan provided adequate guidance for dealing with the litigation where only compensatory claims were available. Cullity J. also observed that the plaintiffs' litigation

plan covered most of the criteria set out by Nordheimer J. in *Bellaire v. Independent Order of Foresters* (2004), 5 C.P.C. (4th) 68 (S.C.J.). Cullity J. has extensive expertise and experience as a certification motion judge and his conclusions on this issue are entitled to deference.

[43] Leave to appeal on this issue is therefore dismissed.

Disposition

[44] For the reasons outlined above, the motion is allowed in part. Leave to appeal to the Divisional Court is granted on the following issues:

1. Did the certification motion judge err in concluding that proof of the amount of the alleged wrongful gain subject to an accounting and disgorgement and/or a constructive trust is a common issue?

2. Did the certification motion judge err in concluding that a class proceeding is the preferable procedure to resolve the plaintiffs' claim in waiver of tort?

[45] The costs of this motion are reserved to the panel disposing of the appeal.

LEDERMAN J.

Date of Release: July 10, 2007

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DATE: 20070710

ONTARIO
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LEDERMAN J.

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