COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bartram v. Glaxosmithkline Inc.,*
2011 BCCA 539

Date: 20111230
Docket: CA039373

Between:

Meah Bartram, an Infant by her Mother and Litigation Guardian, Faith Gibson and the said Faith Gibson

Respondents
(Plaintiffs)

And

Glaxosmithkline Inc. and Glaxosmithkline UK Limited

Appellants
(Defendants)

Before: The Honourable Madam Justice Prowse
(In Chambers)

On appeal from: Supreme Court of British Columbia, August 30, 2011
(*Bartram v. Glaxosmithkline Inc.*, 2011 BCSC 1174, Vancouver Registry S081441)

Counsel for the Appellants:	W. McNamara R. Sutton
Counsel for the Respondents:	G. Kosakoski D.M. Rosenberg, Q.C.
Place and Date of Hearing:	Vancouver, British Columbia December 21, 2011
Place and Date of Judgment:	Vancouver, British Columbia December 30, 2011

Reasons for Judgment of the Honourable Madam Justice Prowse:

[1] Glaxosmithkline Inc. (the "defendant") is applying for leave to appeal the decision of a chambers judge, made August 30, 2011, dismissing its application for production of the medical and pharmaceutical records of the intended representative plaintiffs in a proposed class action proceeding, prior to responding to the application for certification. It also seeks a stay of proceedings in the Supreme Court pending the disposition of the appeal.

[2] By way of brief background, the plaintiffs have applied to certify a class action on behalf of children born in Canada to mothers who took the antidepressant prescription drug Paxil during their pregnancies, and on behalf of mothers who took the drug. The certification application (set to be heard in October 2012) seeks to have Faith Gibson appointed as representative plaintiff in the class proceeding. She claims that she took Paxil during her pregnancy, as a result of which her daughter, born in September 2005, suffers from cardiovascular defects, and, in particular, a ventricular septal defect ("VSD"). The defendant manufactures, markets and sells Paxil in Canada.

[3] The plaintiffs allege, amongst other things, that the defendant knew or ought to have known, at least as of June 2003, that there was a significant risk of adverse cardiovascular complication for babies born to mothers who ingested Paxil during pregnancy, and that the defendant failed to apprise the plaintiff or her physicians of that risk. Included in the materials before the chambers judge was a document dated December 2005 authored by the defendant (or related company) informing health practitioners that Paxil may cause a higher incidence of birth defects, particularly atrial septal defects ("ASDs") and VSDs, in children born to mothers who took Paxil during the first trimester of pregnancy.

[4] The common issues sought to be certified by the plaintiffs include: (a) whether Paxil caused or increased the likelihood of birth defects; (b) whether Paxil is unfit for its intended purpose; (c) whether the defendants failed to warn class

members and/or Health Canada of the true risk of birth defects caused by using Paxil; and (d) whether the defendants breached a duty of care to class members, and if so, when, and how. Counsel for the plaintiffs advised in oral argument that "failure to warn" is the predominant issue.

[5] The defendant's application was for the production of all medical and pharmaceutical records for the plaintiffs for a period beginning two years before Ms. Gibson first took Paxil and continuing to the present. It alleges that it requires those records in order to properly and fully respond to the certification application.

[6] The plaintiffs took the position before the chambers judge that the requested documents may be relevant and admissible at some later time in the proceedings, but that they were not relevant on the certification application, particularly in circumstances where the defendants had not yet filed materials responsive to the certification application (or, for that matter, a statement of defence or a response to civil claim).

[7] After referring to relevant provisions of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*Act*"), authorities in British Columbia and other Canadian jurisdictions, and the record before him, the chambers judge, who is also the case management judge, dismissed the defendant's application. He observed that there was no automatic right to discovery of documents at the certification stage and that the applicant must demonstrate a need for such discovery. He dealt at some length with the evidence of Dr. Lammer, upon which the defendant placed particular reliance in asserting the need for production of the requested documents and gave reasons. He then set forth his conclusion with respect to the request for production of the requested documents at para. 21 of his reasons, as follows:

> In conclusion, I am not persuaded that this is one of the exceptional cases where pre-certification disclosure of medical records is necessary. Indeed, the introduction of individual medical records at this stage would be more likely to improperly confuse the issues on the certification action with a premature consideration of the merits of an individual claim.

[8] In determining whether this is an appropriate case in which to grant to leave to appeal, the Court must consider the following factors:

1) whether the appeal is *prima facie* meritorious;

2) whether the point on appeal is of significance to the practice;

3) whether the point raised is of significance to the action itself; and

4) whether the appeal will unduly hinder the progress of the action.

[9] With respect to the merits of the proposed appeal, counsel for the defendant acknowledges that the order under appeal is essentially discretionary in nature. He submits, however, that the chambers judge erred in the exercise of his discretion by failing to properly consider all of the requirements for certification under s. 4(1) of the *Act* in determining whether the requested records were necessary to make a fair and informed decision on the pending application for certification. In particular, he submits that the chambers judge erred by focusing "solely" on s. 4(1)(c) of the *Act*, which deals with the question of common issues, and in failing to consider whether the records were necessary to determine whether a class proceeding was the preferable procedure (s. 4(1)(d)) and whether the proposed representative plaintiffs would fairly and adequately represent the proposed class (s. 4(1)(e)). The defendant also submits that the chambers judge erred in his analysis of the common issues factor by misinterpreting and misapplying the expert evidence of Dr. Lammer, an expert relied upon by the defendant in asserting that the documents were necessary to properly respond to the application for certification.

[10] In its written argument, the defendant also suggests that, if the records are produced, "it may be clear that Ms. Gibson did not ingest Paxil during pregnancy, or that Ms. Bartram does not have the [medical] conditions alleged." The defendant did not pursue this submission in oral argument, and it appears to me to be sufficiently lacking in any discernible foundation, except, perhaps, as an invitation to a fishing expedition, that I do not propose to address it.

[11] The defendant also submits that the chambers judge failed to consider that its request for production of records in this case would constitute a minimal inconvenience and expense to the plaintiffs on the basis that the records requested are limited in scope and the defendant is prepared to pay for their production. Counsel for the defendant also adversely commented on the nature of the medical evidence proffered by the plaintiffs on the basis that it suggested a lawyer-driven approach to this litigation. This suggestion does not appear to have been made to the chambers judge, and I do not find it helpful to my determination on this leave application.

[12] Counsel for the plaintiffs submits that there is no merit to the proposed appeal and that the application for the production of the requested documents is, at best, premature. Counsel emphasizes that the decision not to order production was a discretionary decision, which attracts a highly deferential standard of review. That standard of review has been found by this Court to be even higher where the decision is made by a case management judge who is familiar with the case and has ongoing responsibility for it. Counsel observes that a case management judge on procedural applications such as this is in the best position to determine what evidence is required in order to properly determine a certification application. He submits that there is no basis for interfering with the decision that no persuasive basis had been established for the production of the requested documents at this early stage of the proceeding. Counsel submits that the chambers judge was clearly aware of, and referred to, the requirements of s. 4 of the *Act* and that it was not necessary for him to give detailed reasons for rejecting the defendant's submissions with respect to each of the subsections.

[13] Counsel for the plaintiffs also submits that the evidence of Dr. Lammer, upon which the defendant placed considerable reliance, was focused largely on causation issues, and that the chambers judge was justified in finding that the production of the requested documents at this stage of the proceeding would be more likely to confuse, than to elucidate, the issues on certification.

[14] The plaintiffs submit that the fact that the defendant is prepared to pay for production of the documents is of little moment in determining whether the chambers judge erred in finding that they were not necessary at this stage of the proceedings. They also submit that the exceptionally private nature of the documents requested, which relate to Ms. Gibson's physical and mental health before, during and following the birth of her child, are factors which militate against requiring production earlier than necessary to do justice between the parties.

[15] In summary, the plaintiffs submit that the defendant is simply seeking to have this Court substitute its discretion for that exercised by the chambers judge, which is not a permissible basis for granting leave to appeal.

[16] Generally speaking, the merits threshold in determining whether to grant leave to appeal is relatively low. In *A.L.J. v. S.J.M.* (1994), 46 B.C.A.C. 158 (in Chambers), the test was expressed as "[w]hether the applicant has identified a good arguable case of sufficient merit to warrant scrutiny by a division of this Court." Where the order under consideration is discretionary, leave to appeal will generally only be granted where the order is clearly wrong, where a serious injustice would occur if leave were refused, or where discretion was exercised on a wrong principle. (See, for example, *Strata Plan LMS 2019 v. Green*, 2001 BCCA 286 (in Chambers).) The standard of review of discretionary orders is very stringent, and it is even more so where the appeal is from the discretionary order of a judge who has case management of the proceedings. The reason for the deferential approach to such orders is referred to by Mr. Justice Donald in *Robak Industries Ltd. v. Gardner*, 2006 BCCA 395 (in Chambers), at para. 13:

> This Court's policy of non-intervention derives from the obvious reason that the orderly pre-trial processes in complex cases should be interrupted by this Court as seldom as possible given the power of the case management judge to adjust to evolving circumstances and even to re-visit directions when necessary.

[17] After reviewing the materials and authorities, I am not persuaded that there is any merit in the proposed grounds of appeal. In coming to that conclusion, I am in essential agreement with the substance of the submissions made by counsel for the

plaintiffs in opposition to this application. For example, I am unable to ascertain a reasoned basis for finding that the chambers judge failed to fully consider the adequacy of the record before him in relation to the factors set out in s. 4 of the *Act*. He specifically referred to the s. 4 criteria for certification and he was not required to do a subsection by subsection analysis of why he found the evidence sufficient to enable him to proceed without requiring production of the requested medical records. In coming to that conclusion, he clearly considered the evidence of Dr. Lammer, who opined that further evidence was necessary. Ultimately, that is a legal decision, albeit informed by the medical and other evidence. The chambers judge was of the view that production of the requested evidence had the potential to confuse, rather than clarify, the relevant issues at the certification stage. After reviewing Dr. Lammer's affidavit, I see no likelihood of this Court finding that the chambers judge erred in any significant way in his interpretation of this evidence, or in failing to appreciate its significance.

[18] Based on the authorities to which he was referred, the chambers judge accepted that production of the requested documents at this early stage of the proceedings should not be ordered as a matter of course, but only in exceptional circumstances where, for example, they were necessary to supplement the record before the court at the certification hearing. As case management judge, and the judge who will ultimately hear the certification application, he was in a privileged position in making the determination as to whether the record was sufficient in that regard. I can see no prospect of a division of this Court interfering with his judgment call in that regard.

[19] In my view, the tenor of the defendant's submission, based largely on Dr. Lammer's affidavit, is that medical records of this kind, or the equivalent information in affidavit form, is essential as a matter of course to enable a defendant in an action involving personal injury in the product liability context to properly plead or respond to an application for certification. The effect of that position would be to transform what is a recognized exception to the practice into the norm. In that regard, it is noteworthy that the counsel for the defendant did not challenge the law

upon which the chambers judge relied, and, in particular, the principle that orders of this nature were not to be granted as a matter of course. Rather, the defendant reiterated the submissions it made to the chambers judge to the effect that it was not possible to determine the issues on certification without the requested documents, given what it described as a "paper thin" evidentiary record. As earlier stated, it is not for this Court to substitute its exercise of discretion for that of the chambers judge, in the absence of clear error of the nature I have earlier described.

[20] It may be that at some point after the defendant files its responsive materials on the certification application (and/or files a statement of defence in the action), a more substantial basis for production of documents will arise. That remains to be seen. At this stage, however, I repeat that I see little likelihood that a division of this Court, applying the relevant standard of review, would interfere with the impugned order.

[21] In addition to finding that the proposed appeal does not pass the merits threshold, I am also of the view that the issues raised are not of general significance to the practice. In that respect, there is no challenge to the general principles applicable to production of documents at the pre-certification stage of proposed class action proceedings, at least in British Columbia. (There may be variations from province to province depending on the wording of the legislation.) As earlier stated, the challenge here is to the exercise of discretion by the chambers judge, a matter which will vary from case to case.

[22] Counsel for the defendant indicated that it would be helpful if this Court were to provide greater direction as to the nature and extent of the evidentiary foundation required for a certification application, but I do not see this case, based on its facts, as the vehicle for such a discussion. Nor do I find the simple fact that class action proceedings are frequently national in scope calls for appellate intervention for the purpose of stating general principles in the absence of a significant conflict in the authorities in this province. On the contrary, the fact that procedural requirements

differ to some extent from province to province suggests that principles enunciated in this Court may not prove to be of general utility.

[23] Nor am I persuaded that this appeal is of particular interest to the action itself since, as noted by Mr. Justice Donald, there is a considerable degree of flexibility in the case management process which may result in the issue of production of these records being revisited at a later stage. Further, if certification is ultimately granted and the defendant pursues an appeal of that decision, my decision on this leave application should not be taken to preclude this issue being raised as an issue on that appeal.

[24] Finally, with respect to the timing of this application and whether an appeal would unduly interfere with the progress of the action, I note that this Court has very early dates for the hearing of an appeal; the parties agreed that they could be prepared to proceed with an appeal in mid-March 2012; and the certification hearing is not set to be heard until October 2012. If the other factors favoured granting leave to appeal, the factor of potential delay would not have militated against doing so.

[25] In the result, having considered all of the relevant factors, I would dismiss the application for leave to appeal.

[26] Since I have dismissed the application for leave to appeal, I would dismiss the application for a stay as moot.

"The Honourable Madam Justice Prowse"