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August 2, 2018

Recent decision in pharmaceutical class action highlights importance of scrutinizing common issues in proposed class proceedings

While class actions can be a useful tool for access to justice, there are limits to the types of claims that can be appropriately advanced through class proceedings. Indeed, the requirements for certification that appear in similar form in virtually every class action statute across Canada are meant to ensure that only those actions that can meaningfully proceed as class actions are in fact certified. Many cases, including certain types of pharmaceutical product liability claims, will simply be unsuitable for certification as a class action. The recent decision of the Ontario Superior Court in *Price v H Lundbeck A/S* provides an example of such a case.

That case was a proposed class action against H. Lundbeck A/S and Lundbeck Canada Inc. in relation to the drug Citalopram. Citalopram is a selective serotonin reuptake inhibitor (SSRI) that is used for the treatment of depression. Ms. Price brought a proposed class action against Lundbeck, alleging that they had failed to warn women that Citalopram could cause birth defects.

Initially, at the outset of the case, the plaintiffs had sought to certify common issues relating to both the allegation that Lundbeck failed to warn Canadian physicians and patients that Citalopram could cause birth defects and also relating to whether Citalopram was or may be teratogenic (that is, whether it could cause birth defects). However, by the time the certification motion arrived, the plaintiffs had focussed their case on a single common issue: from 1999, did the defendants' breach a duty to warn Canadian physicians and patients that Citalopram is or may be teratogenic? Consequently, the certification proceeding went forward on the basis of that single common issue.

Ultimately, the judge hearing the certification motion, Justice Perell, found that most of the requirements for certification were not met, and he declined to certify the proceedings as a class action.

Where the claim primarily failed was on the requirement that there be common issues. While Justice Perell held that there

was some basis in fact for the question that Lundbeck breached the duty to warn Canadian physicians and patients that Citalopram is or may be a teratogenic, he held that this proposed common issue did not satisfy the test of commonality. He identified this for two reasons. First, he held that there was significant variation across the types of birth defects pleaded:

> [132] First, the duty to warn itself is not common across the class because commonality does not exist and cannot be semantically manufactured over such a broad range of dangers. Commonality does not exist in the case at bar because congenital malformations present a broad range of potential hazards ranging from the risk of minor human body imperfections of a cosmetic nature to major imperfections that destroy the quality of a person's life or that destroy life itself.
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> [133] As noted above, the adequacy of a warning depends upon the nature and gravity of the potential hazard and the nature and extent of any given warning will depend on what is reasonable having regard to all the facts and the circumstances relevant to the product in question. In the case there may be commonality for one or even some combinations of the more hazardous congenital malformations, but there is no conceivable commonality in warning about birth defects generally as if they were all of the same gravity.

Second, Justice Perell held that the duty to warn is not a common issue because it did not form a substantial part of each class member's case:

> [134] Second, the duty to warn issue is not common because the resolution of it will not avoid duplication of fact-finding or legal analysis, because its resolution is not capable of meaningful extrapolation to assist each Class Member, and because even if the duty to warn issue was resolved favourably for the Class Members, its resolution will not form a substantial part of each Class Member's case and very substantial individual inquiries will required for each Class Member claims. Put bluntly, the duty to warn issue does not connect the dots for a common issues trial that has any utility for a class proceeding that inevitably end with individual issues trials with very significant causation issues associated with the breach of the duty to warn.

This aspect of Justice Perell's decision signals the need for a robust analysis as to the appropriateness of particular common issues. His reasoning demonstrates that the mere fact that an

issue can be framed as a common issue across the class is not sufficient. Rather, it serves a reminder that certified common issues must actually be common across all class members and must be a substantial part of each class member's claim. Where there is a single common issue, and that common issue remains dwarfed by multiplicity of individual issues, the common issues requirement will not be satisfied.

Justice Perell also held that a class proceeding was not the preferable procedure for resolving class members' claims. Justice Perell again held that the sheer number of alleged birth defects that were part of the claim and the overwhelming number of individual issues would have meant that a class proceeding was not the preferable procedure.

Justice Perell did find that two of the five requirements for certification were met. In particular, he concluded that requirement that the pleadings disclosed a reasonable cause of action was met, and he also held that there was an identifiable class of two or more persons. However, with regard to the identifiable class requirement, Justice Perell did limit somewhat the scope of the plaintiff's class to only include individuals who had been prescribed branded Celexa manufactured by Lundbeck rather than the generic version of Citalopram. This had the impact of significantly narrowing the class that would have been certified, had the other requirements been met

As Justice Perell repeatedly notes, the decision in *Price v H Lundbeck* does not mean that pharmaceutical product liability class actions can never be certified. However, it does signal that courts will carefully scrutinize such claims in determining whether they can meaningfully proceed as class action. Where the diversity of the claims is too significant or where individual issues threaten to overwhelm common issues, those claims may not be appropriate to certify as class proceedings.