Case Name:

Schwoob v. Bayer Inc.

Between
Ann Schwoob, Cody Schwoob by his Litigation Guardian Ann Schwoob and Christine Lovelace, Plaintiffs, and Bayer Inc., Defendant

[2013] O.J. No. 1738

2013 ONSC 2207

Court File No. 52030/10

Ontario Superior Court of Justice

D.S. Crane J.

Heard: January 28-30, 2013; written submissions, March 6, 2013.
Judgment: April 15, 2013.

(55 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Common interests and issues -- Definition of class -- Procedure -- Representative plaintiff -- Motion by plaintiffs to certify action as class proceeding allowed -- Defendants manufactured oral contraceptives containing component that plaintiffs claimed defendants knew was unsuitable for use because of greater risk of adverse consequences -- Pleadings disclosed reasonable cause of action in negligence and waiver of tort -- Temporal limit of proposed class definition properly maintained link between class and specified common issues -- Proposed common issues bore rational relationship between class and causes of action and were common to all class members -- Class proceeding was preferable procedure -- Proposed plaintiffs could take advice and instruct counsel -- Minor problems with litigation plan.

Motion by the plaintiffs to certify the action as a class proceeding. The defendant was a Canadian pharmaceutical company that was responsible for the manufacturing, distribution and sale of oral contraceptives known as Yasmin and YAZ. In addition to an estrogen component, they contained a unique progesterone component known as drospirenone. The plaintiffs alleged that the drospirenone component of Yasmin and YAZ was unsuitable for use as there was greater risk of adverse consequences when compared with other combination oral contraceptives, which was known only to the defendant at the time. The plaintiffs claimed that the defendant was negligent in design, testing, failing to warn and in marketing, distributing and selling Yasmin and YAZ. In addition, the plaintiffs

pleaded waiver of tort. The plaintiffs brought the action on behalf of all women in Ontario who were prescribed and ingested Yasmin and/or YAZ from the respective dates of introductions of those drugs into the Canadian market and November 30, 2011, the date when Health Canada changed the product monographs to include additional warnings, and all persons who had a Family Law Act derivative claim. The plaintiffs proposed common questions included whether the use of Yasmin or YAZ caused or contributed to an increased in adverse health consequences compared to other oral contraceptives, whether they were defective or unfit for their intended purpose, whether the defendant breached its duty of care in the way it marketed and distributed Yasmin and YAZ and whether the defendant failed to warn of the risks.

HELD: Motion allowed. The pleadings disclosed a reasonable cause of action in negligence and for waiver of tort. The class was properly defined. The temporal limit of the proposed class definition properly maintained the link between the class and the specified common issues. The proposed common issues bore a rational relationship between the class and the causes of action. As the proposed questions were exclusively on the conduct of the defendants, there were common to all members of the class. The proposed common issued addressed general causation and therefore advanced the individual issue of specific causation. A class proceeding was the preferable procedure as the matter involved a large number of claimants, the common issues involved the conduct of the defendant and the resolution of the common issues would be determinative for the entire class. The proposed plaintiffs were appropriate as there was no conflict of interest between them and any class member and they could take advice and give instruction to counsel. There were some concerns with the litigation plan as the proposed notices of claim were overly broad and could cause potential harm to the legitimate business interests of the defendant.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. c. 6, s. 1, s. 5(1), s. 5(1) (a), s. 5(1)(b), s. 5(1)(c), s. 5(1)(d), s. 5(1) (e)

Family Law Act, R.S.O. 1990, c. F.3,

Rules of Civil Procedure, Rule 21

Cases Cited:

Magill v. Expedia Inc. 2013 ONSC 683.

Hunt v. Carey Canada [1990] 2 S.C.R. 959.

Anderson v. Wilson (1999) 44 O.R. (3d) 673 (C.A.) at p. 679, leave to appeal ref'd [1999] S.C.C.A. No. 476.

Serhan Estate v. Johnson & Johnson et al., (2006), 85 O.R. (3d) 665 (Div. Ct.).

Heward v. Eli Lilly & Co. (2006), 39 C.P.C. (6th) 153; aff'd [2008] O.J. No. 2610.

Tiboni v. Merck Frosst Canada Ltd., [2008] O.J. No. 2996 (S.C.J.).

Cloud v. Canada (Attorney-General) (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd, [2005] S.C.C.A. No. 50.

Rumley v. British Columbia [2001] (3S.C.R.) 184 at paras. 31-33.

Pearson v. Inco Ltd. 78 O.R. (3d) 641 (C.A.).

Anderson v. St. Jude Medical Inc., (2003), 67 O.R. (3d) 136, 136 leave to appeal ref'd, [2005] O.J. No. 269 (Div. Ct.).

Hollick v. City of Toronto et al. [2001] 3 S.C.R. 158 page 173, para. 20.

Wilson v. Servier Canada Inc. (2000), 50 O.R. (3d) 219.

White v. Merck Frosst Canada, 2004 CarswellOnt 659.

Counsel:

Michael Peerless and Matthew Baer, for the Plaintiffs.

Patricia D.S. Jackson, Grant Worden and Rebecca Wise, for the Defendants.

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1 D.S. CRANE J.:-- The plaintiffs move for certification of this action pursuant to the *Class Proceedings Act*, 1992, S.O. c. 6 (the CPA) against the defendant Bayer Inc. The defendant opposes certification on each of the requirements of s. 5(a) of the CPA.

2 The plaintiffs bring this action on behalf of those women in Ontario who were prescribed and ingested Yasmin and/or YAZ, from the respective introductions of these drugs into the Canadian market and the date of November 30, 2011. This action is against Bayer Inc., a Canadian corporation wholly owned by Bayer A.G. The action alleges that the defendant is responsible in Canada for the design, manufacture and development of the formula; for preparing, processing, inspecting, testing, packaging, promoting, marketing, distributing, labelling and/or selling for a profit either directly or indirectly to an agent, affiliate, predecessor or subsidiary. All as pleaded in paragraphs 5 and 6 of the Fresh as Amended Statement of Claim.

3 It is pleaded that Yasmin was approved by Health Canada for use through medical prescription on December 10, 2004, and that YAZ was likewise approved late in 2008.

4 Yasmin and YAZ are combination oral contraceptives (COC), that is, they contain both an estrogen and a progestin component. The estrogen component, ethinyl estradiol, is common to many COCs. The progestin component used in Yasmin and YAZ, drospirenone, is unique in Canada to these two oral contraceptives. YAZ and Yasmin are considered to be fourth generation COCs.

5 The first generation COCs are not now widely used. The second and third generation COCs use one of the progestin hormones; levonorgestrel, norgestrel, desogestrel or gestoden, respectively. These COCs are presently widely used.

6 It is my understanding of the case for the plaintiffs is that the drospirenone component of Yasmin and YAZ is unsuitable for use as there was greater risk of adverse consequences when compared to other COCs, known only to the defendant at the time.

7 Each of Yasmin and YAZ have never been withdrawn from the marketplace and have continually been available since their introduction to Canadian women through the prescription of a licensed medical practitioner.

8 I will deal *'in seriatim'* with the requirements for certification in s. 5(1) of the CPA, together with some observations and conclusions that are of general application.

9 Perrell, J. provides the structure, I quote in part from his Introduction in Magill **1**, Appendix A, paras. 83 and 84:

> [83] The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions - providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 26-29; *Hollick v. Toronto* (City), [2001] 3 S.C.R. 158 at paras. 15 and 16.
>
> [84] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim: *Hollick v. Toronto* (City), [2001] 3 S.C.R. 158 at paras. 28-29.

Twenty years of experience is now available of the practices, processes and the policies under the CPA to inform the certification motion courts on the application of the 3 goals.

10 These two statements taken as written focus on a significant issue in this motion, namely, the imposition of behaviourial modification "to sanction wrongdoers" without an inquiry on the merits of the plaintiffs' allegations.

11 Persons who are aware of what some call the 'real world' may well infer that there can be significant negative economic consequences from the publication of notices of a court certified action against a well-known drug company brought on behalf of all users of its oral contraceptive pills alleging that those medications are (fatally) flawed.

12 In those cases in which a motion by the defendants for dismissal on summary judgment is not likely to be successful, might not that defendant upon a granting of an order for certification seriously weigh its business interests in settling the action to preserve its place in the market, excluding the merits of the action?

13 In my view, behaviour modification is a potential consequence rather than an objective of the certification process.

14 The full court press this defendant has brought to this certification motion (and to similar cases in the past) do, to my mind, support the reality of the concern. And perhaps, a continuing examination of the balance between the goals of access to justice (as between plaintiffs and defendants) and of the goal of behaviour modification (as between wrong-doing and right-doing defendants).

15 On the other hand, there is possibly a rough balance of tensions between the parties found in the potential for an award of a very substantial sum in costs against the representative plaintiffs'

indemnifying class counsel under the typical contingent fees agreement should these economically disastrous allegations prove to be unfounded.

S. 5(1)(a) - DISCLOSURE OF A CAUSE OF ACTION

The test under this section of the CPA is essentially the same as for Rule 21 as follows:

(a) no evidence is admissible for purposes of determining the section 5(1)(a) criterion;
(b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proven and thus assumed to be true;
(c) pleadings will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect: Hunt v. Carey Canada 2; Anderson v. Wilson 3;
(d) the novelty of the cause of action will not militate against the plaintiff;
(e) matters of law not fully settled in the jurisprudence must be permitted to proceed, and;
(f) The pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information.

16 The cause of action is negligence of design, testing, failure to warn, and of marketing, distribution and sale. The plaintiffs plead in law that the defendant owes the class members a duty of care and that it breached that duty in the circumstances pleaded. The proposed representative plaintiffs are alleged to have suffered damages within the alleged negligent conduct of the defendant under its duty of care owed to these women.

17 In addition the plaintiffs plead action in restitution or waiver of tort. This pleaded remedy is at a stage in law which is not established with any certainty, if at all. The claim is presented as a cause of action and has been recognized as such in a number of certification motions in the Province of Ontario, for example: (Serhan 4; Heward 5 and Tiboni 6, citations in Appendix A).

18 This motions judge is of the view that there must be a tort proven in order to have a waiver of tort. Other justices of this court hold a different view, perhaps the better view. Accordingly, given that the certification process is procedural, the pleading of waiver of tort is allowed to proceed. In my view, a comprehensive and thoughtful discussion is found in the decision of Cullity, J. in Heward, affirmed by the Divisional Court, supra.

19 I find that the requirements of 5(1)(a) are satisfied with respect to the causes of action in negligence and the claim for a remedy based on waiver of tort.

SECTION 5(1)(b) - AN IDENTIFIABLE CLASS

20 The plaintiffs propose two classes, defined as follows:

(1) All persons resident in Ontario who were prescribed and used combination oral contraceptives Yasmin and/or YAZ, which were

manufactured, marketed, and/or sold or otherwise placed into the stream of commerce in Canada by the defendant between their respective introductions onto the Canadian market until November 30, 2011; and

(2) All persons resident in Ontario who by virtue of a personal relationship to any one or more of the persons described above, have a 'Family Law Act' derivative claim for damages.

21 The defendant submits the class as overly broad. The remedy offered is not to certify.

22 It is my observation that there has been a marked expansion of the jurisprudence of the CPA to mass tort actions, over the time from the initiation of the CPA in Ontario in 1992-3. The evolution, primarily in product liability cases, has been lead by the Court of Appeal and the Supreme Court of Canada. It is now established that the common issues requirement is met even should it resolve a limited component of liability, leaving the individual issues as the major component for liability resolution, (see paras. 51 to 65 of Cloud v. Canada (A.G), **7**.

23 Clearly here there are crucial issues of establishing a claimant's assertion of harm caused through the use of the defendant's product and of issues of acceptance of risk. However if this is a bar to certification, as is submitted by the defendant, then there are a large number of Ontario cases that have been wrongly certified, similarly on the jurisprudence as to class definitions. It has been clear, really from the beginning of class proceedings litigation in Ontario, that a definition of class must not presume fault on a defendant. It seems to me, given that product liability is within the ambit of class proceedings, there is very little, if anything, left for identification of claimants other than those persons who have used or been exposed to a product deemed flawed or defective. Counsel for the defendant submits such a definition of all users, et. cetera, is overly broad. That submission may well be so in logic, but importantly, not so, in our jurisprudence.

24 Counsel for the defendant submits that the plaintiffs by restricting their proposed definition temporary to November 30, 2011, have conceded that they have no case on defective product. With respect, I do not agree. Counsel has simply chosen the stronger position for litigation.

25 Plaintiffs' counsel advise that they are financing the prosecution of this litigation under a contingent fee agreement. This arrangement is the present practice in class proceedings litigation. The Court must therefore acknowledge the realities of this arrangement. One of which is that counsel will not only choose their cases but also the causes of action, in order that there is a reasonable chance of success, Rumley v. B.C. **8**, S.C. at p. 201; Pearson v. Inco **9** CA at para. 62.

26 The temporal limit of 30 November, 2011 is the date that Health Canada changed the product monographs of Yasmin and YAZ for additional warnings of possible risk of adverse effects in the use of these products.

27 As is often observed in the reasons given in certification motions, the definition of the class and the specified common issues for trial must be closely linked. Here the temporal limit of the proposed definition to users before 30 November, 2011 maintains that link as distinct from claimants who used the products after the issuance of the revisions to the product monograph of November, 2011. In my view, properly so.

28 I see no basis to narrow the definition without arbitrarily excluding persons who bear the same interest in the resolution of the common issues. In this, I apply the principle that a proper class

definition does not need to include only those persons whose claims will be successful, Anderson v. St. Jude Medical Inc. **10**.

29 In coming to my decision there's comfort in the observation of the Supreme Court of Canada in Hollick **11** para 20;.

> In product liability actions the class is usually defined with reference to persons who purchased the subject product within a defined location and time and are thereby bounded and identifiable. Subsequent to certification class sizes may by definition be either reduced or enlarged, see for example, Bartram v. GlaxoSmithKline Inc. para. 26.

30 I approve the proposed definition of users based on precedent and upon the reasoning discussed under the subheadings Common Issues and Preferable Procedure. However,for purposes of tightening the definition I require that the commencement dates for each of Yasmin and Yaz be included.

I find that having accepted the proposed class definition of users, the definition of the derivative class follows. For the purposes of assisting identification, I do require that the provisions in the Family Law Act of those persons entitled to a derivative claim be quoted in the definition.

SECTION 5(1)(c) REQUIREMENT: COMMON ISSUES

31 Section 1 of the CPA defines "common issues" as:

> (a) common but not necessarily identical issues of fact, or;
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts

32 The proposed common issues found at paragraph 96 of the plaintiffs' factum have, in my view, been well thought out by plaintiffs' counsel in that they do bear a rational relationship between the class and the causes of action. I conclude also that as the proposed questions are exclusively on the conduct of the defendant, they are common to all members of the class.

33 The proposed common issues place the focus on whether or not the progestin component of drospirenone in Yaz and Yasmin is markedly less safe (more dangerous) than other COCs and if so, whether the defendant knew, or ought to have known, within its duties of care owed to the class.

34 The proposed common issues address general causation and hence advance the individual issue of specific causation. The proposed common questions are such that should the defendant succeed at trial the result would be a determination of all litigation of all persons within the class definition. Alternatively, only success of the commons issues at trial, permits each and every claimant to present a claim for individual causation and damages.

35 The common questions as proposed by the plaintiffs are the following:

> i. Can use of Yasmin and/or YAZ cause or contribute to an increased risk of pulmonary embolism, deep vein thrombosis, stroke, heart issues and/or gallbladder disease/removal compared to using other available oral contraceptives?
> ii.

If the answer to (1) is yes, are Yasmin and/or YAZ defective or unfit for the purpose for which they were intended as designed, developed, fabricated, manufactured, sold imported, distributed, marketed or otherwise placed into the stream of commerce in Canada by the Defendant?

iii. Did the Defendant breach a duty of care owed to the Class by the way in which Yasmin and/or YAZ were marketed and distributed in Canada?

iv. Did the Defendant knowingly, recklessly or negligently breach a duty to warn or materially misrepresent any of the risks of harm from using Yasmin and/or YAZ?

v. If one or more of the common issues (1) through (4) 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 adverse events related to the use of Yasmin and/or YAZ?

vi. By virtue of waiver of tort, is the Defendant liable on a restitutionary basis:

(a) to account to any of the Class, including the Ontario Ministry of Health which has a subrogated claim, on a restitutionary basis, for any part of the proceeds of the sale of Yasmin and/or YAZ? If so, in what amount and for whose benefit is such an accounting to be made? Or, in the alternative,

(b) such that a constructive trust is to be imposed on any part of the proceeds of the sale of Yasmin and/or YAZ for the benefit of the Class, including the Ontario Ministry of Health which has a subrogated claim, and if so, in what amount, and for whom are such proceedings held?

36 Counsel for the plaintiffs have formulated their proposed common issues closely with that approved in Heward**5**, supra, undoubtedly purposely. I have read closely the reasoning of Cullity, J., the motions judge in Heward and considered in turn the reliance therein, on the reasoning of Cumming, J. in Wilson v. Servier Canada Inc.**12**. Similarly, counsel for the defendant Bayer has put forward essentially the same objections here as in Heward with the important distinction that the factual record at bar is of course unique to this case.

37 The plaintiff has filed basically two sources of evidence, namely the affidavit of Sabrina Lombardi and the affidavits of Dr. D. L. Sackett. The defendant has, "inter alia", filed the product monographs prior to 30, November, 2011, and thereafter.

38 The affidavit of Ms. Sabrina Lombardi contains articles published in learned journals on issues relevant to this action. Counsel for the defendant objects on the submission that the exhibits cannot be admitted as evidence citing a decision of this Court in White v. Merck Frosst Canada**13**.

39 On my reading, White v. Merck Frosst does not address the circumstances of this case. In my view the requirement of "some evidence" with regard to articles is subject to the discretion of the motions judge on admissibility. The materials here, on the evidence of the affiant, are publications in learned journals by authors of appropriate credentials. I would admit this evidence but only for a limited purpose, namely of demonstrating that knowledge of COCs including those distributed by the defendant, is not a closed subject, that research is ongoing and information and understanding with regard to health effects of COCs is both diverse and continuing from inception to date. To be clear, the evidence is not admitted for the purpose of relying on the opinion expressed. It is my view that in the circumstances of this case the exhibits to Ms. Lombardi's affidavit do constitute some evidence supporting the motion for certification.

40 The second source of evidence is the affidavits of Dr. Sackett. He is a medical doctor eminently qualified in the fields of epidemiology and biostatistics and a founder of the Centre for Evidence-Based Medicine at Oxford University

41 Although I have no way of knowing how Dr. Sackett and his opinions will fare under the cross-examination of counsel for the defendant in this action should the case go to trial, it is my view that this speculation is merits based and the evidence provided by Dr. Sackett is sufficient to give the necessary colour and legitimacy to the allegations sought to be litigated in this class proceeding.

42 The defendant has filed the evidence of Dr. Greenberg and Dr. Carrier in particular as fresh evidence, the affidavit of 25 February, 2013 with the Position Statements of The Society of Obstetricians and Gynaecologists of Canada, herein after SOGC.

43 I understand the Position Statement of the SOGC is to support the use of COCs on the conclusion that the benefits of usage outweigh the risks (for applicable women). The principle benefit being the prevention of unwanted pregnancies with their potentially catastrophic consequences. The SOGC makes five recommendations. Only the fifth bears directly on this motion. I quote:

> "5) Women using COCs should be advised that the highest quality evidence available at this time does not suggest a difference in VTE risk based on the type of progestin."

44 Whether or not there is/was increased risk to users of the defendant's products is the place that the plaintiffs join issue with the defendant. This is the issue on the merits.

45 I note that the proposed common issue (v.) is the same as common issue number 4 approved in Heward. Each of these questions address the subrogated interest of OHIP. Similarly, for the issue on waiver of tort; on the jurisprudence referred to earlier, I am prepared to approve issue (vi). on the basis of novel or developing law.

SECTION 5(1)(d) - The Preferable Procedure

46 I begin with the consideration that the claims of the class are to be considered as to common issues and individual issues in the process of determining the extent to which the resolution of the common issues would advance the objectives of the CPA, namely access to justice, judicial economy and behavioral modification.

47 It is recognized that causation is an individual issue of complexity that may require evidence of expert witnesses in a trial of the individual causes of each claimant who seeks damages. However on the evidence of this record, particularly the measurement of risk of adverse effects of one or more users per 10,000 woman years, the inference is that there would not be a large number of individual cases, notwithstanding the several hundred thousand users.

48 I find that a class proceeding would be a manageable process in the context of a large number of claimants in the class definition as the common issues will resolve on the conduct of the defendant and the pharmaceutical industry. I would foresee little or no trial input from the claimants.

49 Cumming, J. in a pharmaceutical class action involving a multitude of individual issues concluded that the mechanisms within the CPA provide the necessary tools to render the class proceeding the preferable procedure constituting a fair, efficient and manageable way of determining

common issues presented by the claims of the proposed class members, see Wilson v. Servier Canada Inc.**12**. He concludes that the common issues, for reasons of fairness and efficiency, ought to be determined in a single proceeding given that a resolution of those issues would be determinative for the entire class. On the other hand, the defendant here, as in Wilson, seeks to isolate each individual claimant who may assert a personal injury claim and put that person to the formidable cost of dealing with these complex and protracted issues, see Wilson, at paragraph 105, and addressing the different mechanisms in the CPA, see Wilson, paragraphs 111-118.

50 In my view, the analysis and conclusions made by the learned motions judge in Wilson, supra, apply equally to the case at bar. I quote paragraphs 124-126, volume 8, tab 62, pages 24-25:

> [124] In my view, the policy objectives underlying the *CPA* will be furthered if this action is certified as a class proceeding. Access to justice is extended to persons who may have been injured by a defective product. There would be a very significant cost to any claimant pursuing an individual claim given the tremendous complexities of evidence and issues, the extensive scientific and medical evidence and discoveries, and the protracted nature of the litigation: see *Bendall,* [1993] O.J. No. 1948, at para. 50. But for a class proceeding, the defendants (if responsible) would in all probability be effectively isolated from the individual claims.
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> [125] Judicial economy and efficiency will be achieved if the common issues are resolved in a single proceeding. It is only by spreading and sharing the cost through the scale efficiencies of a class action that members will have an opportunity to resolve their claims. Moreover, by resolving common issues through a single proceeding, the danger of producing inconsistent results through a multiplicity of trials is avoided: see *Abdool v. Anaheim Management Ltd.* 1995 CanLII 5597 (ON SCDC), (1995), 21 O.R. (3d) 453 at pp. 472-73, 121 D.L.R. (4th) 496 ("*Abdool*").
>
> [126] Finally, the policy objective of behaviour modification is fostered through a class proceeding. If a drug is defective and liability attaches to a manufacturer or seller, a significant incidental result is that the pharmaceutical industry is more likely to take greater care in the development and testing of new products to ensure their safety before marketing them. The thalidomide catastrophe is illustrative of the public interest in ensuring safe drugs. The *CPA's* goal has been described as inhibiting "misconduct by those who might ignore their obligations to the public": *see Abdool, supra,* at p. 472. The *CPA* serves to assist in regulating the pharmaceutical industry for an important public policy objective through class proceedings commenced in the private sector.

SECTION 5(1)(e) - THE REPRESENTATIVE PLAINTIFFS AND THE LITIGATION PLAN

51 The plaintiff Ann Schwoob filed an affidavit deposing that she was a user of Yasmin and that her son, the infant plaintiff Cody Schwoob, has a derivative action pursuant to the *Family Law Act.* The co-plaintiff Christine Lovelace has deposed that she was a user of YAZ. Their use of these pharmaceuticals fall within the temporal and geographic definition of the class. They each allege an adverse reaction to the respective drugs within the range of the risks which the plaintiffs claim that the

defendant's products were flawed. It is the evidence of each of the proposed plaintiffs that had they been told there was an increased risk (of embolism) with Yasmin and YAZ, respectively, they would have used other COCs. That in my view is sufficient for this motion.

52 I do not accept the submission that the proposed plaintiffs be rejected on the basis that there is not more representative plaintiffs claiming adverse reaction and damages to each of the alleged flaws of the subject products. The common issues involve a determination as to whether indeed there is increased risk; whether the subject products are unfit for the purposes marketed and importantly, whether the defendant owed a duty of care to the class as users of those products, all as specifically set out under CPA s. 5(1)(c) of these reasons.

53 I do not accept that there is a conflict of interest between the representative plaintiffs to any member of the class. Further, each plaintiff is able to take advice from counsel and give appropriate instructions to counsel.

54 I have some concerns with the proposed litigation plan (within the context of amendment). In particular, I find the proposed scope of the notices of claim to be overly broad and potentially harmful to the legitimate business interests of the defendant. We are at only the procedural stage of this litigation. I would ask counsel to have a discussion on a revised order providing for notice to potential claimants and, of course, any other items in the proposed litigation plan at their discretion. Following that process I would recommend an initial telephone conference to be arranged by the trial coordinator at Hamilton to discuss further process towards the issuance of the formal orders. My goal in this later regard is that counsel may agree on the wording.

D.S. CRANE J.

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APPENDIX A

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(1) Magill v. Expedia Inc. 2013 ONSC 683
(2) Hunt v. Carey Canada [1990] 2 S.C.R. 959
(3) Anderson v. Wilson (1999), 44 O.R. (3d) 673 (C.A.) at p. 679, leave to appeal ref'd [1999] S.C.C.A. No. 476
(4) Serhan Estate v. Johnson & Johnson et al., (2006), 85 O.R. (3d) 665 (Div. Ct.)
(5) Heward v. Eli Lilly & Co. (2006), 39 C.P.C. (6th) 153; aff'd [2008] O.J. No. 2610
(6) Tiboni v. Merck Frosst Canada Ltd., [2008] O.J. No. 2996 (S.C.J.)
(7) Cloud v. Canada (Attorney-General) (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd, [2005] S.C.C.A. No. 50
(8) Rumley v. British Columbia [2001] 3 S.C.R. 184 at paras. 31-33
(9) Pearson v. Inco Ltd. 78 O.R. (3d) 641 (C.A.)
(10) Anderson v. St. Jude Medical Inc., (2003), 67 O.R. (3d) 136, 136 leave to appeal ref'd, [2005] O.J. No. 269 (Div. Ct.)
(11) Hollick v. City of Toronto et al. [2001] 3 S.C.R. 158 page 173, para. 20
(12) Wilson v. Servier Canada Inc. (2000), 50 O.R. (3d) 219
(13) White v. Merck Frosst Canada, [2004] O.J. No. 623, 2004 CarswellOnt 659

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