

COURT FILE NO.: 05-CV-295910-CP
DIVISIONAL COURT FILE NO.:605/07
DATE: 20080515

SUPERIOR COURT OF JUSTICE - ONTARIO
DIVISIONAL COURT

RE: FRANK PETER, Mrs. BERNADETT PETER, MARK PETER,
Ms. BERNADETT PETER, BRIAN FREDERICK FOOTE,
RHONDA LYNN LO MONACO, ANITA PRAIN, FRANCINE
NOROUZI

Plaintiffs

- and -

MEDTRONIC INC., and MEDTRONIC OF CANADA LTD.

Defendants

Proceeding under the *Class Proceedings Act 1992*

BEFORE: Mr. Justice Carnwath

COUNSEL: *Won J. Kim & Joel P. Rochon*, for the Plaintiffs

Patrick O'Kelly & Danielle Royal, for the Defendants

HEARD: May 12, 2008

ENDORSEMENT

CARNWATH J.:

[1] The application for leave to appeal is denied.

[2] I have considered the submissions of counsel in the light of our Court of Appeal's direction regarding the deference owed to those judges assigned to hear certification motions:

This is the first time this court has considered the certification of a class action and I am mindful of the deference which is due to the Superior Court judges who have developed expertise in this very sophisticated area of practice. The Act provides for flexibility and adjustment at all stages of the proceeding and any intervention by

this court at the certification level should be restricted to matters of general principle.

(*Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.), leave to appeal to S.C.C. denied (S.C.C.), at p. 677)

[3] McPherson J.A. repeated this principle when he noted that judges assigned to hear certification motions “develop an expertise which should be recognized and respected by appellate courts”. (See: *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.), at pp. 247-8)

[4] Waiver of tort – The moving parties submit that Hoy J. made three errors in respect of waiver of tort. I respectfully disagree.

- (a) *Heward v. Eli Lilly* is not a conflicting decision nor is it binding on Hoy J. The facts are different in that Lederman J. was persuaded by i) the failure to plead that all class members would not have taken Zyprexa if appropriately informed; and, ii) the fact that Zyprexa had not been recalled and remained on the market. In this matter, the facts are just the opposite.
- (b) Subrogated claims were certified in both *Heward* and *Serhan* (Div. Ct.). *Family Law Act* claims were certified in *Heward*. There is no conflict in so certifying.
- (c) I find no error in certifying common issues relating to waiver of tort. I rely on the judgment of Epstein J. in *Serhan*:

Given the uncertain state of law concerning both waiver of tort and the potential of disgorgement liability and the circumstances under which the remedy of a constructive trust may be recognized, it is not appropriate that the court should embark upon an analysis of this nature and significance at this early stage without a complete factual foundation. This is particularly so given the policy implications of the issues raised in this proceeding, implications for which the class proceedings regime in this province is specifically designed in that it is intended to provide a mechanism for correcting the behaviour of wrongdoers who would, absent its specialized procedures, be immune from legal consequences for their behaviour.

((2006), 85 O.R. (3d) 665 (C.A.) at para. 157)

[5] Conspiracy – I find no error in Hoy J.’s finding that the conspiracy pleading was sufficient. In her function as case-management judge, she was entitled to monitor and promote discussions between the parties to arrive at a proper conspiracy pleading. Her actions fell short of those described by Winkler J. in *Caputo v. Imperial Tobacco* as “descending into the arena”. I find no prejudice to the moving parties.

[6] Special damages – I find the special damages properly pleaded. See, *Hunt v. Carey* and *Yordanes v. Bank of Nova Scotia*.

[7] Hoy J. heard submissions over four days. She crafted careful and reasoned responses to each of the Moving Parties' submissions. I find nothing in her reasons to persuade me that the correctness of the decision is open to serious debate. The cases submitted by the Moving Parties to support the submission that there are conflicting decisions are fact-driven. They do not reveal the adoption of different principles from those applied by Hoy J.

[8] There shall be costs to the Responding Parties on a partial indemnity basis fixed at \$12,000, inclusive of fees, disbursements and GST, payable thirty days.


CARNWATH J.

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