

CITATION: Pardhan v. Bank of Montreal, 2012 ONSC 4681
COURT FILE NO.: 08-CV-350772CP
DATE: 20120815

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the *Class Action Proceedings Act, 1992, S.O. 1992, C. 6*

BETWEEN:)
)
ALNASSIR PARDHAN) *Maurice J. Neirinck and Michael McQuade,*
) for the Plaintiff
Plaintiff)
)
– and –)
)
BANK OF MONTREAL) *Irving Marks and Barbara Green, for the*
) Defendant
)
)
Defendant)
)
) **HEARD:** August 8, 2012

C. HORKINS J.

SUPPLEMENTAL REASONS

[1] The certification motion in this proceeding was heard in January 2012. In reasons delivered on April 12, 2012, I found that the plaintiff had satisfied the criteria in s. 5 of the *Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA")* with the exception of the criterion in s. 5(1)(e).

[2] The Litigation Plan was deficient and the evidence raised concerns about Mr. Pardhan's health and therefore his ability to act as the representative plaintiff. I adjourned the certification motion and provided the plaintiff with an opportunity to file further evidence relevant to s. 5(1)(e). The defendant ("BMO") was given an opportunity to respond.

[3] The parties filed further evidence and this certification motion continued on August 8, 2012. For the following reasons, I conclude that the criterion in s. 5(1)(e) has now been satisfied and the motion to certify this proceeding as a class action is granted.

THE LITIGATION PLAN

The Jury Notice Issue

[4] The Litigation Plan recognizes that there is a jury notice filed in this proceeding and that BMO may bring a motion in the future to strike it. Equitable claims cannot be tried by a jury pursuant to s.108(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. However, the common issue dealing with negligence can be tried by a jury. It is premature to decide now if the jury notice should be struck. The Litigation Plan recognizes the existence of the issue and fairly proposes that it be resolved at a later date in the action.

Communication with Class Members

[5] Class counsel now has a clear proposal for communicating with the class members. The website and database of 3,747 class members, previously controlled by Mr. Jethwani (dvgnews.com) has been transferred to class counsel for their use. This website will serve as the main tool to communicate with class members. Class counsel has retained someone to assist in the further design of the website. This list of 3,747 putative class members contains names and contact information as well as particulars about the money each person gave to Damji. The list will be updated as further people are identified.

[6] The evidence confirms that the Ismaili community in Ontario, particularly in Toronto, is a tight knit group. Once certification is granted, this community will assist in spreading the word about the class action.

[7] The Litigation Plan provides for a motion to obtain the records of the Receiver. It is expected that these records will reveal further names of investors and evidence about their losses.

Managing the Damages

[8] The Litigation Plan now clearly addresses how damages will be managed and confirms that any punitive damage award will be shared on a pro rata basis. Evidence about a class member's damage claim will be collected through a form that class members will complete. Copies of supporting documents will be provided and scanned into a database. Class counsel will provide BMO with this evidence.

THE REPRESENTATIVE PLAINTIFF

Mr. Pardhan's Health Issue

[9] Mr. Pardhan suffered a stroke in May 2011. As set out in my April reasons at paras. 326-333, I had concerns regarding Mr. Pardhan's ability to act as the representative plaintiff given his health. When Mr. Pardhan was cross-examined on November 10, 2011, he was asked about the stroke. He testified that his doctors had verbally told him that his health was good enough to

allow him to pursue the litigation. He also testified that his doctors had told him that the stroke affected his short and long term memory.

[10] Mr. Pardhan provided a brief medical report from Dr. Homuth stating that Mr. Pardhan “is medically stable to continue with the court case in question. His recent medical history should [sic] no problems to proceeding”. I had concerns about this brief letter because it did not mention Mr. Pardhan’s memory problem and there was no evidence about Dr. Homuth’s qualifications. I requested a further medical report or, alternatively, that another representative plaintiff be proposed.

[11] I adjourned the certification motion so that further medical evidence could be provided to address my concerns. I directed as follows: “The doctor who provides the report must have sufficient expertise and familiarity with Mr. Pardhan’s health and must be fully informed about the nature of the role of the representative plaintiff. The doctor must be able to explain the nature and extent of the memory limitations and provide an opinion as to whether or not such limitations will interfere with Mr. Pardhan’s ability to fulfill the role of the representative plaintiff.” I gave Mr. Pardhan 30 days to provide any further evidence he wished to rely on. BMO was given 30 days to respond.

[12] Mr. Pardhan and class counsel chose not to offer a replacement representative plaintiff. There are others who could replace Mr. Pardhan, but class counsel and Mr. Pardhan prefer that he carry on as the representative plaintiff. Mr. Pardhan has spent a considerable amount of time educating himself about the action and is committed to doing the job. Further, he says that he no longer suffers from any memory impairment.

The Medical Reports

Dr. Sherali Esmail is Independent

[13] After release of my reasons, Mr. Pardhan consulted with a cardiologist, Dr. Juan Maldonado and was told to see a neurologist to obtain the necessary medical report.

[14] An appointment was booked for Mr. Pardhan to be examined by a neurologist, Dr. Sherali Esmail, on May 2, 2012. BMO argues that Dr Esmail is “not completely independent” and therefore is “not properly qualified as an expert witness”.

[15] Because I imposed a 30 day limit for the filing of further evidence, there was limited time to secure a medical report. Mr. Jethwani, who is involved in the litigation against Damji, assisted Mr. Pardhan in securing an appointment with a neurologist in the Ismaili community - Dr. Esmail.

[16] When BMO cross-examined Dr. Esmail, the doctor explained that he knows Mr. Jethwani from their community and the doctor’s wife has worked with Mr. Jethwani on fundraising. Ordinarily, a patient would have to wait six or seven months for an appointment to see Dr. Esmail. In this case an early appointment was provided.

[17] Dr. Esmail is peripherally aware of this proceeding because his wife was approached about investing in the Damji teeth whitening scheme and they declined. Dr. Esmail knows people in his community who invested money in the scheme including his brother who invested a small amount of money.

[18] BMO argues that I should not accept Dr. Esmail's opinion because he is "too connected" to the class to fulfill the role of an impartial witness. I do not accept BMO's argument. Dr. Esmail is not offering an opinion on the merits of the action. He was retained simply to opine on the memory loss and whether Mr. Pardhan can perform the role of a representative plaintiff. Dr. Esmail had never met Mr. Pardhan until he examined him.

[19] The fact that Dr. Esmail knows people who invested in the Damji scheme does not mean that he lacks impartiality. If BMO's argument is accepted then one can imagine that there would be many situations where a doctor cannot provide a medical legal opinion in an action. For example, if people are injured in a large accident that is well known, the examining doctor may know people in his community that were injured.

[20] Finally, the BMO argument is not logical. Why would a doctor who is "connected" to the community support Mr. Pardhan's ability to act as a representative plaintiff if there are ongoing memory problems. Implicitly, BMO is saying that because Dr. Esmail is "too connected" to the Ismaili community he would write a report supporting Mr. Pardhan's ability to act as the representative plaintiff rather than revealing ongoing memory problems. This does not make sense. The opposite is likely to occur – the doctor would be concerned about Mr. Pardhan acting as the representative plaintiff and would reveal any ongoing suspected memory problems (if they existed).

Dr. Esmail's Opinion – First Report

[21] Pursuant to my direction, Dr. Esmail was fully informed about the role of the representative plaintiff. Mr. Pardhan gave Dr. Esmail a copy of his medical records. Dr. Esmail familiarized himself with Mr. Pardhan's health. Mr. Pardhan told Dr. Esmail that he had experienced problems with his long and short term memory, but both had resolved. I note that Mr. Pardhan also confirmed the resolution of his memory problems in a sworn affidavit.

[22] Dr. Esmail prepared a report dated May 30, 2011. The report states that Dr. Esmail conducted a physical and mental examination and the results were normal. Mr. Pardhan scored 30/30 on the "Montreal Cognitive Assessment" ("MOCA test"). This included a score of 5/5 on the memory task. Dr. Esmail found "no evidence for memory loss or any cognitive change based on the assessment" that was done. He showed "no impairment in attention or concentration and showed normal judgment as well as language function and memory". Mr. Pardhan was able to give Dr. Esmail "detailed accounts of his symptoms which were corroborated with the medical records contained in the Mount Sinai Hospital notes". Dr. Esmail concluded that there was "no evidence for any memory limitations or any medical issues that would impair or interfere with Mr. Pardhan's ability to fulfill his role" as the representative plaintiff in this class action.

BMO's Medical Evidence

[23] BMO retained two doctors to review Dr. Esmail's report. Reports were produced from Dr. David Gladstone a stroke neurologist and Dr. Michel Silberfeld a psychiatrist. Neither doctor examined Mr. Pardhan or challenged Dr. Esmail's credentials. They acknowledge Dr. Esmail's opinion but state that further investigation is required before they can provide an opinion. In my view, the further investigation that these doctors say is required goes beyond the standard practice in the medical community and well beyond the level of assurance that is required.

Dr. Gladstone

[24] Dr. Gladstone prepared two reports. He states that Mr. Pardhan's short hospital stay and discharge without any rehabilitation is "indicative of a mild stroke and suggest that Mr. Pardhan likely did not have any significant physical or cognitive stroke deficits or disability". He acknowledges that Dr. Esmail conducted a "standard neurological history and examination". This included the MOCA test that is the "widely accepted screening instrument that is sensitive for detection of cognitive impairments"

[25] Dr. Gladstone explains that his opinion about Mr. Pardhan's cognitive function is limited because he did not examine Mr. Pardhan and further testing should be done. He recommends an MRI study of the brain and formal neuropsychological testing. He describes formal neuropsychological testing as "the single most important assessment of his cognitive functioning" and states that it is possible to score normal on the MOCA test and yet have cognitive impairment. However, when Dr. Gladstone was asked if such tests are done for every stroke patient, Dr. Gladstone replied "No of course not". When cross-examined, Dr. Gladstone agreed that a neurological assessment is the "gold standard" and he only refers selected patients for such assessments. Dr. Gladstone did not explain the circumstances in which he would make such a referral and yet he asserts that one is required for Mr. Pardhan who suffered a mild stroke.

Dr. Michel Silberfeld

[26] Dr. Silberfeld prepared a report dated June 18, 2012. He states that Dr. Esmail is a "well qualified expert on strokes". He cannot opine on Mr. Pardhan's ability to act as the representative plaintiff without further investigation. In addition to demonstrating that Mr. Pardhan does not have dementia, Dr. Silberfeld explains that Mr. Pardhan must demonstrate that he has "the higher mental functions of understanding and comprehending the specific legal questions" about his role as a representative plaintiff. In my view, this goes well beyond the memory issue that required resolution. It was never intended that Mr. Pardhan's "higher mental functions and understanding" would be the subject of investigation by a psychiatrist.

Dr. Esmail's Reply

[27] Dr. Esmail reviewed the reports of Drs. Gladstone and Silberfeld. While he agrees that a neuropsychological assessment is a reasonable tool to evaluate cognitive function in patients that have had strokes, it is not the standard method of assessing their cognitive function.

[28] In 25 years of practice, Dr. Esmail has never conducted neuropsychological tests on any of his patients. As he explained, "Nobody does neuropsychological testing in stroke patients as part of clinical assessments. They are not available and they cost \$1,600 and are not covered by the government." Further the literature reveals that self reports of cognitive impairment have good or very good correlation with cognitive impairment. In addition, the Canadian Best Practice recommendation for stroke care revealed that the MOCA test is considered more sensitive to cognitive impairment than the mini mental status examination. The literature also reveals that the MOCA test is "highly sensitive as a screening tool for cognitive impairment in patients post-stroke. The sensitivity was measured at 0.94".

[29] Finally, it is necessary to deal with a reference in Dr. Esmail's first report to the stroke date of April 2010. The defence went to great lengths to argue that this is evidence of Mr. Pardhan's ongoing memory problems since he would have told Dr. Esmail that this was the date of the stroke. I reject this suggestion. Dr. Esmail states in his second report that the reference to 2010 was a typographical error and the medical records confirm that the stroke happened in April 2011 not 2010. This is a logical explanation and I accept it.

[30] In summary, I accept the opinion of Dr. Esmail. I conclude that the memory deficits have resolved and there is no longer a concern regarding Mr. Pardhan's ability to act as the representative plaintiff.

[31] The criterion in s. 5(1) (e) has been met.

COMMON ISSUES

[32] I approved the common issues with some revisions in my April reasons. The revised list of approved common issues is as follows:

- (1) Did BMO engage in conduct between January 1, 2000, and March 31, 2002, which amounted to a knowing assistance of Salim Damji with respect to a breach of trust owed to the Class Members?
- (2) Did BMO engage in conduct between January 1, 2000, and March 31, 2002, which amounted to a knowing receipt of monies being defrauded by Salim Damji from the Class Members including trust monies?
- (3) Should BMO be declared a constructive trustee for the Class Members of all monies deposited into the aforesaid bank accounts of Cash Plus with BMO between January 1, 2000 and March 31, 2002?
- (4) Did BMO owe a duty of care to the Class Members with respect (i) to monies deposited into the bank accounts of Cash Plus at BMO's bank branch located at Brown's Line and Evans in the City of Toronto, between January 1, 2000, and March 31, 2002, and (ii) to BMO's dealings with those bank accounts and/or Damji?

- (5) If the answer to common issue (4) above is yes, did BMO breach the said duty of care owed to the Class Members?
- (6) Have the Class Members suffered loss or damage as a result of any of the conduct referred to in issues (1), (2), (3), (4) and (5) above? If so, what is the appropriate measure or amount of such loss or damages?
- (7) Should BMO pay punitive damages to the Class Members? If so, what is the amount of such damages?

CONCLUSION

[33] The plaintiff has satisfied the criteria under s. 5 of the *CPA*. I certify this proceeding as a class action.

[34] In summary, I make the following orders:

- (1) This action is certified as a class proceeding pursuant to the *CPA*.
- (2) I approve the common issues set out in my reasons.
- (3) The class is defined as follows:

All persons (i) who reside in Canada, (ii) who gave monies to or for Salim Damji (“Damji”) on account of a fraudulent Damji tooth whitening process promotion variously known as STS Instant White and other STS related names, (iii) whose monies were directly or indirectly deposited into bank accounts of Cash Plus at the Bank of Montreal’s Brown’s Line and Evans bank branch in the City of Toronto between January 1, 2000, and March 31, 2002, and (iv) who have not recovered all of their said monies.

- (4) Alnasir Pardhan is appointed the representative plaintiff for the class.
- (5) Notice of certification will be given to the class in a manner approved by the court. Costs of the notice to be determined by the court.

[35] Counsel shall prepare an order that incorporates my conclusions and complies with s. 8 of the *CPA*.

[36] If the parties cannot agree on costs, they must deliver written submissions to the court by September 24, 2012, in accordance with a schedule to be agreed upon by counsel. This schedule must allow for a brief reply from the plaintiff.

C. Horkins J.

Released: August 15, 2012

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SUPERIOR COURT OF JUSTICE

BETWEEN:

ALNASSIR PARDHAN

Plaintiff

– and –

BANK OF MONTREAL

Defendant

**SUPPLEMENTAL REASONS FOR
JUDGMENT**

C. Horkins J.

Released: August 15, 2012