Product liability claim of drug alleged to cause increased risk of harm denied under Class Proceedings Act

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In *Palmer v. Teva Canada Ltd*, the Ontario Superior Court of Justice denied certification, under the *Class Proceedings Act, 1992* (the Act), of a proposed class action for product liability on the basis that a plaintiff who may have suffered an increased risk of harm does not have a legally viable negligence claim if that harm has not yet materialized.

Background

In *Palmer*, the court was asked to certify a proposed class action relating to an allegedly contaminated pharmaceutical drug. The plaintiffs were prescribed Valsartan, a drug indicated to treat high blood pressure. The defendant pharmaceutical companies manufactured and distributed the bioequivalent of Valsartan. Each defendant subcontracted the manufacture and supply of the drug's active ingredients to a company in China.

The plaintiffs alleged that the active ingredients supplied by this company contained certain nitrosamine compounds, and that exposure to those compounds increases the risk of being diagnosed with cancer. The plaintiffs ingested the defendants' allegedly contaminated Valsartan product. They sued, pleading causes of action in product liability negligence, strict liability, toxic battery, breach of consumer protection laws, breach of the *Civil Code of Québec*, breach of the *Competition Act* and unjust enrichment. They sought damages for psychological harm, pure economic losses and punitive damages.

Court Decision

Justice Perell dismissed the certification motion, concluding that the proposed class action did not meet the criteria for certification under the *Class Proceedings Act.*

First, the court rejected all of the causes of action the plaintiffs alleged. In particular, Perell J. held that the claims in product liability negligence, one for personal injury for psychological harm, the second for pure economic loss, could not be certified. While

there was “some basis in fact” that exposure to the nitrosamine compounds increased the plaintiffs’ risk of being diagnosed with cancer, the court concluded that the mere creation of this risk could not ground a successful claim in negligence. The plaintiffs needed, instead, to demonstrate that they were actually harmed by the drugs and, for the pure economic loss claim, that they were exposed to an imminent and serious threat to their person or property.

The court further found that the proposed action did not raise common issues, which is another requirement for certification under the Act. The claim for pure economic loss could not succeed because there was no compensable harm.

As for the claim of personal injury for psychological harm, most of the proposed class would not be able to demonstrate mental injury of a serious and prolonged nature. Regardless, any emotional distress upon learning of the increase risk of cancer diagnosis was connected to a fear of increased risk of potential harm, which is not compensable under Canadian law.

The court also refused to certify certain questions about causation, aggregated damages and punitive damages.

Finally, the court found that the proposed class action was not the preferable procedure for resolving the common issues and that, regardless, it would not have advanced the three purposes of class actions.

Accordingly, the court dismissed the certification motion. Further, because there were no viable causes of action, the court dismissed the action.

Key Takeaways

The *Palmer* decision reaffirms the need to demonstrate actual, as opposed to future harm, especially in negligence cases. Under Canadian law, the creation of risk is not by itself tortious conduct; rather, the tortfeasor must have caused actual harm to a plaintiff in order for the plaintiff to recover. In this case, the plaintiffs’ made the “fatal” choice to seek compensation for merely an increased risk of being diagnosed with cancer.

Perell J.’s decision also applies the law in Canada that for a claim for pure economic loss arising from negligent supply of shoddy goods, the plaintiff must demonstrate that the defect in question poses an imminent risk of physical harm to persons or property.

The decision nevertheless leaves some questions unanswered. First, could the risk of future harm be sufficient, for the purposes of a certification motion, if it is linked to a present injury? This possibility was suggested in the Ontario Superior Court of Justice decision in *Kaplan v. Casino Rama* and the Newfoundland and Labrador Court of Appeal’s 2010 decision in *Dow Chemical Company v. Ring, Sr.*, citing the UK House of Lords decision in *Grieves v. F T Everard & Sons and others*.

Second, is the degree of risk relevant? In this case, the risk introduced by the contaminated drugs was low. Further, the court noted how nitrosamine compounds are found in our food, water and soil and that, even without any exposure to the contaminated drugs, there is a 50 per cent risk of developing cancer in one’s lifetime.

We may need to await future decisions for answers to these questions.

For more information related to disputes or class actions, please reach out to Byron Taylor-Conboy or the key contacts listed below.

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