Court of Appeal dismisses claimants' appeal in the Seroxat group litigation

On Friday the Court of Appeal handed down judgment in the Seroxat litigation in *Bailey and others v GlaxoSmithKline* [2019] EWCA Civ 1924. It dismissed the Claimants' appeal against the ruling of the trial judge, Lambert J, defining the limited scope of the case they were permitted to advance at trial as to why it was alleged that Seroxat was defective.

BACKGROUND - THE SEROXAT GROUP LITIGATION

1. In this long-running group action the Claimants allege that Seroxat, an SSRI anti-depressant manufactured by GSK, is defective within the meaning of the Consumer Protection Act 1987 (the "CPA") because they claim that its capacity to cause symptoms on discontinuation is worse than other SSRIs.

2. The Claim Form was issued as long ago as 2007, although the litigation was effectively stayed for almost five years from December 2010 after the Claimants' public funding was withdrawn on merits grounds. Although a number of claimants discontinued, a group of over 100 of them then obtained third-party funding and the litigation was revived from 2015 onwards.

3. Over a series of hearings before Foskett J the court set out the nature of the Claimants' case which was being permitted to proceed to trial. Lambert J was appointed as the trial judge in November 2018. The trial, listed for three months, finally started before her at the end of April 2019.

THE DECISION OF THE TRIAL JUDGE

4. During openings the Claimants asserted that, in determining whether the safety of Seroxat is such as persons generally are entitled to expect under s.3 CPA, the court should proceed on the basis that Seroxat has no relative benefits when compared with other medicines in the appropriate comparator class, and therefore assume "a level playing field" of risks and benefits as between the

medicines in the comparator class, save for the single characteristic said to constitute the "defect", i.e. discontinuation symptoms.

5. GSK disputed that this approach was correct and/or permissible. In order to assess whether a medicine was "defective" within the meaning of the CPA, it is necessary to take a holistic approach to the assessment of its safety by considering its risks and benefits. The Claimants' pleaded case did not do this.

6. GSK submitted that the litigation had been carefully case-managed in advance of trial and that the Claimants' case had been tightly defined in the series of Court rulings by Foskett J and Lambert J. These had held that the Claimants' case was that Seroxat was defective simply because it was "worst in class" for discontinuation symptoms (with an associated allegation of a failure to warn that Seroxat was "worst in class" in this respect).

7. In particular, GSK submitted that the previous court rulings had determined that the relative risks and benefits of Seroxat, whether in comparison with other SSRIs or otherwise, did not form part of the Claimants' pleaded case. It was not open to the Claimants to seek to expand their pleaded case on defect at trial, contrary to the earlier court rulings, to try and include them. GSK had maintained from the outset that the Claimants' approach to the assessment of defect, relying on a single adverse event, was wrong as a matter of law, logic and evidence, and that a holistic approach was required in determining the safety of a prescription medicine.

8. Following the completion of oral openings, Lambert J accepted GSK's position. She ruled on 9 May (at [2019] EWHC 1167 (QB)) that the Claimants' case was limited to the allegation that Seroxat is "worst in class" for discontinuation symptoms when compared with other drugs in the comparator class. It could not be extended to the relative risks and benefits of Seroxat and its comparators more generally, on the basis of an assumed *"level playing field"* or otherwise.

THE DECISION OF THE COURT OF APPEAL

9. The Claimants sought to appeal against her ruling and the trial was adjourned for that purpose. They were refused permission to appeal by Lambert J, but granted it by Newey LJ at the end of July. The Court of Appeal (The Senior President of Tribunals, Hamblen LJ and Jackson LJ) heard the appeal on 31 October 2019 and unanimously dismissed it.

10. Hamblen LJ's judgment, with which the rest of the Court agreed, was handed down on 8 November and essentially upheld the decision of Lambert J for the reasons she gave. The Court of Appeal confirmed that the Claimants' case on defect had been defined in the series of previous court rulings. Indeed, in March 2017 Foskett J had made clear that the case had only been permitted to proceed on the basis of the Claimants' narrow pleaded case as defined by the court. If the Claimants had taken issue with the characterisation of their pleaded case, they should have appealed those earlier court rulings; but they did not do so.

11. In dismissing the appeal the Court of Appeal also held that the approach adopted by the Claimants at trial involved advancing a risk/benefit case when the trial judge had expressly determined that it would not feature; this was *"plainly impermissible",* was done *"far too late"* and with *"obvious unfairness to GSK"*.

COMMENT

12. Although the judgment essentially confirmed that the Claimants were confined to their pleaded case as previously determined by the court in several previous rulings, the judgment features wider points of interest to product liability practitioners.

13. First, the Court of Appeal endorsed the *"holistic approach"* to product safety set out by Hickinbottom J in *Wilkes v DePuy International Limited* [2016] EWHC 3096 (QB). This is the first Court of Appeal approval for the holistic approach to the assessment of defect set out by Hickinbottom J in *Wilkes,* although practitioners will be aware that this approach was also followed by Andrews J in her judgment in *Gee v DePuy International Limited* [2018] EWHC 1208 (QB).

14. Secondly, the Court of Appeal found (at paragraph 41) that the Claimants could have appealed the March 2017 judgment of Foskett J whether or not his ruling on the scope of their case had been expressly reflected in the terms of the order.

15. Further, the appeal is a reminder of the fundamental importance for CPA claimants of precisely identifying the defect alleged. The Court of Appeal quoted with approval Lambert J's statement that *"there must be absolute clarity in the Claimants' case on defect. It is that defect which must cause the injury. It is in respect of that defect that the Defendant is entitled to raise its development risk*

defence. The Claimants' case on defect drives the scope of the expert evidence and the focus of the trial."

16. Finally, the Court of Appeal's decision also emphasises the importance attached by the court to the identification of issues for trial in group actions. A party that wishes to dispute or depart from the identified issues must make its position clear and appeal any relevant interim decisions in good time. The Court of Appeal has shown itself willing to robustly support case management decisions by judges.

17. Charles Gibson QC, Malcolm Sheehan QC, Adam Heppinstall and James Williams of Henderson Chambers appeared for GSK. They were instructed by Addleshaw Goddard LLP, where the team was led by Louisa Caswell and included Mark Chesher, Sivan Daniels, Cécile Burgess, Gabriella Coombe and Megan Goodman.