

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

JACQUELINE SHAW

PLAINTIFF
(RESPONDENT)

AND:

SERVIER CANADA, INC.
LES LABORATOIRES SERVIER
SERVIER AMERIQUE
INSTITUT DE RECHERCHES INTERNATIONALES SERVIER, I.R.I.S.
SCIENCE UNION ET CIE
BIOFARMA S.A.
RHONE-POULENC RORER PHARMACEUTICALS INC. and
RHONE-POULENC RORER CANADA INC.

DEFENDANTS
(APPLICANTS)

**REASONS FOR JUDGMENT OF
MR. JUSTICE HUDSON**

[1] The plaintiff, Jacqueline Shaw, a resident of the Yukon Territory, was prescribed certain appetite suppressing drugs, namely fenfluramine (hereinafter "Ponderal") and dexfenfluramine (hereinafter "Redux").

[2] It is not contested at this time that the plaintiff is suffering from certain lung ailments, particularly primary pulmonary hypertension. It is alleged that these conditions result from the side effects of Ponderal and Redux.

[3] The plaintiff's claim is for damages from eight defendants. One defendant, Servier Canada, Inc., was served in Canada and has filed an appearance and a Statement of Defence, and is not a party to these applications. The action herein has been commenced by Writ of Summons and has been served on Les Laboratoires Servier, Servier Amerique, Institut de Recherches Internationales Servier (IRIS), Science Union et Cie, and Biofarma S.A. (hereinafter "the French Defendants") in France, pursuant to the convention for service abroad.

[4] The French Defendants registered a preliminary objection seeking a ruling of the court that the Statement of Claim would not be available to the plaintiff by reason of breach of the rules of the Supreme Court of the Yukon Territory. There was a suggestion that the Statement of Claim was wrongly served on the French Defendants' to the law firm that filed an appearance for Servier Canada Inc. The court accepts that the delivery to that firm was as a result of the appearance filed by Servier Canada Inc. and if more than one copy was delivered it was a courtesy.

[5] Since no appearance has been filed by the French Defendants, the Statement of Claim is not yet due to be served on them as the plaintiff has 21 days after an appearance of the French Defendants is entered to file and deliver the Statement of Claim. The preliminary objection to the plaintiff relying on the Statement of Claim is therefore presumptuous since no Statement of Claim needs to have been served or even filed until the appearance is entered and served. The Statement of Claim was filed and served on Servier Canada Inc. well before the service of the notices of motion herein and therefore no suggestion can be made that the Statement of Claim was calculated to respond to such motions. The fact remains that the Statement of Claim

was in existence at the time these motions were filed and could determine the existence of a real and substantial connection. Indeed to decide the motion, it is necessary and appropriate to refer to the Statement of Claim filed. Accordingly the preliminary objection is dismissed.

[6] The plaintiff has indicated that it is not proceeding at this time against Rhone-Poulenc Rorer Pharmaceuticals, Inc. and Rhone-Poulenc Rorer Canada Inc. There remain the defendants, Les Laboratoires Servier (hereinafter “LLS:); Servier Amerique (hereinafter “Amerique”); Institut de Recherches Internationales Servier (hereinafter “IRIS”); Science Union et Cie (hereinafter “Science Union”); and Biofarma S.A. (hereinafter “Biofarma”). All of these last mentioned defendants are French corporations, and are collectively referred to, as previously mentioned, as “the French Defendants”.

[7] The French Defendants are seeking an order of this court for the following relief:

- a) A Declaration that the purported service of the Writs of Summons on the Applicants was invalid, pursuant to Rule 14(6)(b);
- b) An Order that the purported service of the Writs of Summons on the Applicants be set aside pursuant to Rule 13(10), 13(11), 13(12), 13(13), 13(14), 13(15) and 14(6)(b).
- c) A Declaration that the Supreme Court of the Yukon Territory has no jurisdiction over the Applicants in the proceeding, or alternately, should decline jurisdiction, pursuant to Rule 14(6)(c);
- d) An Order that this proceeding be stayed as against these Applicants;
- e) Costs of this Motion; and

- f) Such further and other Orders as this Honourable Court may deem just.

There are two applications, but they will be treated as one, as they have been presented by one counsel who has only filed one brief.

[8] I am reserving my discussion of (a) and (b) for the latter part of this judgment.

[9] The court was informed that no matter the outcome of this application, there will be an appeal.

[10] In its brief, the applicants indicate that the summary of their grounds are:

- a) there is no real and substantial connection between the applicants, or any of them, or the subject matter of the claim and The Yukon Territory; and,
- b) in the alternative, if jurisdiction *simpliciter* is found then a declaration that France is clearly a more appropriate forum for the trial of the plaintiff's claims against the French Defendants and jurisdiction should be declined accordingly.

[11] The position of the respondent is clearly set out in her brief. She submits:

- (a) there is a real and substantial connection between the applicants and the subject matter of this litigation such that The Yukon Territory has jurisdiction *simpliciter* over the applicants:
 - (i) the real and substantial connection between the applicants and the subject matter of this litigation should be determined with reference to the pleadings. The applicants have not denied all the facts material to the Plaintiff's claims;
 - (ii) the affidavit material filed by the applicants, where it consists of mere denials, is inadequate to displace the rule that these

applications should be determined on the pleadings; and

- (iii) in the alternative, the Plaintiff has filed evidence demonstrating a good arguable case that there is a real and substantial connection between the applicants and the subject matter of this litigation.
- (b) this court should exercise jurisdiction over the applicants as The Yukon Territory is the most appropriate forum for the litigation of this action; and
- (c) in the alternative, the applicants have not met the onus of proving that the foreign jurisdictions are *clearly* the most appropriate forum for the trial of this action.

(The respondent emphasized the word “clearly”).

[12] Dealing with the issue of jurisdiction *simpliciter*, the British Columbia Court of Appeal in *Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C.* (1997), 143 D.L.R. (4th) 213 (B.C.C.A.) at 219 stated, per Prowse J.A.:

It is common ground that the test to be applied in determining whether the B.C. Supreme Court has jurisdiction over these proceedings is whether there is a real and substantial connection between the court and either the defendant or the subject-matter of the litigation (occasionally referred to in the authorities as the ‘transaction’ or the ‘cause of action’). Jurisdiction founded on this basis is referred to as ‘jurisdiction *simpliciter*’.

[13] In *Furlan v. Shell Oil Co.*, [2000] B.J.C. No. 1334 (C.A.) (QL) at para. 3, the Court of Appeal stated:

A court has jurisdiction *simpliciter* over a case when there is a real and substantial connection between the court and the defendant or the subject matter of the litigation. Rule 13(1) of the Supreme Court Rules refines the general proposition by reference to specific categories where an originating process may be served without leave of the court.

[14] There is no issue with the fact that the plaintiff's allegation is that she purchased and consumed Ponderal and Redux in the Yukon Territory, and that she was prescribed and recommended Ponderal and Redux to treat her condition in the Yukon Territory. This pleading is not refuted or denied by the applicants.

[15] It would seem at first that the acceptance of these allegations in the Statement of Claim satisfies the real and substantial connection test described in *Cook, supra*, which refers to a real and substantial connection between the court and either the defendant or the subject matter of the litigation.

[16] The alleged tort, which caused the injury, is allegedly the result of the negligent testing, manufacturing, distribution, representation and sales in Canada (including the Yukon) of Ponderal and Redux, and of actions taken and not taken in connection thereto. It is alleged that the drugs were not fit for their intended purpose and that the French Defendants failed to warn the plaintiff of the dangers of taking Ponderal and Redux. Further, that the French Defendants negligently or intentionally misrepresented the safety of Ponderal and Redux. It is also alleged that the French Defendants failed to ensure the drugs were safe, failed to warn of problems and risks, misrepresented the products and many other acts and non-acts relevant to the claim.

[17] In the absence of evidence countering these allegations, the mere pleadings would support a finding of a real and substantial connection to the Yukon for the purpose of supporting jurisdiction simpliciter of this court.

[18] The applicants have filed affidavits of Marc Milward, who is the Corporate Legal Counsel for the defendants Biofarma, Amerique, LLS, Science Union, and IRIS in

support of their applications. His affidavits form the evidentiary basis of the applications brought by the applicants in this matter. If they fail to put in issue all of the allegations material to the plaintiff's case, then those pleadings would stand uncontradicted and would form the basis for a finding of real and substantial connection.

[19] As background to this matter, the respondent has cited the case of *Wilson v. Servier Canada Inc. and Biofarma S.A.* (2000), 50 O.R. (3d) 219 at 228 (Gen. Div.), which involved virtually the same defendants including Biofarma. The court stated:

No statement of defence has been filed by Biofarma and no affidavit as to documents has been sworn as of yet. At the least, it has been established that, historically, the French and Canadian trademarks with respect to Ponderal were registered to Biofarma. It is admitted that one of the active ingredients in Ponderal is made in France by Oril S.A., an affiliate of Biofarma. There is evidence from which to infer that quite probably Biofarma had a role in the design and creation of Ponderal and Redux. There is a paucity of knowledge at this time as to the history of any patent and any licensing arrangements. However, very little information has been offered to date by Biofarma and Servier, and their affiliates, as to their respective roles in the manufacture and marketing of Ponderal and Redux. Their position has been to resist providing any comprehensive explanation as to the corporations involved in the production of Ponderal and Redux, and then to say there is insufficient evidence to include Biofarma in the claim, as Biofarma is simply a passive parent corporation of Servier. It is far too early to put the plaintiff to the task of unraveling the apparently complex corporate web of Biofarma and its affiliates, and of proving her case.

[20] This finding was the result of an analysis of evidence similar to that tendered in the case at bar. That court also made the same legal analysis as this court is required to make. My conclusions are strengthened, of course, by the fact that the applicants here are essentially the same as the applicants in the Ontario case.

[21] The evidence presented to counter the allegations in the pleadings must be examined and assessed to see if it places a burden on the respondent to provide evidence in support of the pleadings. As indicated, the only evidence tendered by the applicants are the affidavits of Marc Milward. With respect to these affidavits, the respondent, in argument, asserts:

- a) There are a series of denials with respect to Biofarma but no denial of the allegations of testing, designing or promoting Ponderal. The evidence, however, shows that Biofarma is or has been the owner of the patents for Ponderal or Redux or both.
- b) In the evidence by Milward respecting LLS, it does not contain a denial of designing, testing or promoting Ponderal or Redux.
- c) The evidence of Milward respecting Amerique does not contain a denial of designing, testing, or promoting Ponderal or Redux.
- d) The evidence of Milward does not deny that IRIS has designed, tested, Ponderal or Redux.
- e) The evidence of Milward does not deny that Science Union designed or tested promoted or sold Ponderal or Redux.

[22] I am satisfied that there remain substantive allegations in the Statement of Claim of the plaintiff, which have not been placed in issue by the French Defendants.

[23] The law on this point is usefully and relevantly outlined in the case of *Furlan*, *supra*, as follows:

In the result, I do not think that the affidavit evidence of the appellants puts in issue facts that on the face of the pleadings set out a good arguable case for jurisdiction *simpliciter*. The affidavit evidence fails to challenge the allegations of causal linkage in the amended statement of claim necessary for jurisdiction. The respondents were not required to file evidence in opposition to the appellants affidavits because those affidavits did not put in issue the facts pleaded that were essential to jurisdiction. The case as pleaded is not tenuous. The respondents have made out a

`good arguable case' in the sense of a serious question to be tried. The cause of action is on the authorities a tort committed within British Columbia within Rule 13(1)(h).

[24] I find these reasons to be applicable to the case at bar. The respondent submits that if the applicants have placed the allegations in the Statement of Claim in issue by the evidence of Marc Milward, they intend to rely on the affidavits of Petrovic and Ralph, which contain documentary evidence which supports the existence of a real and substantial connection between the issues and the Yukon Territory.

[25] The British Columbia Court of Appeal in the case of *AG Armeno Mines and Minerals Inc. v. PT Pukuaflu Indah et al.*, [2000] B.C.J. No. 1335 (C.A.) (QL), stated at para. 26:

I think that an evidentiary issue only arises if the defendant applicant tenders evidence that puts in question facts essential to the plaintiff's case. In that sense, the applicant has the initial burden of introducing evidence that challenges the plaintiff's allegations in the writ or statement of claim... Once the defendant has discharged its initial burden, I think that the plaintiff is required to tender evidence that satisfies the judge that the plaintiff has a good arguable case in the sense of a triable issue on the facts put in issue by the defendant's evidence. I do not think that there is any duty on the plaintiff to render evidence on allegations in the pleadings that the defendant's evidence has not put in issue.

[26] The respondent in its brief at pages 11 and 12 asserts that:

- a. None of the French Defendants (Biofarma, Servier Amerique, LLS, Science Union et Cie and IRIS) deny that they supplied fenfluramine and dexfenfluramine to the Canadian market.
- b. Servier Amerique, LLS and Science Union have not denied that they tested fenfluramine and dexfenfluramine in Canada or that was destined for a Canadian market.

- c. Servier Amerique has not denied that it made representations concerning fenfluramine and dexfenfluramine in Canada or elsewhere about diet drugs destined for Canada.

[27] A comparison of the Statement of Claim and the evidence in the affidavits of Marc Milward bears out the accuracy of these submissions.

[28] It is, of course, insufficient for there to be mere denials of allegations to be found in the Statement of Claim. *Furlan, supra*, at para. 13 reads as follows:

I do not think that the references in G.W.L. Properties to the plaintiff's duty to show that it had a good arguable case imply that the case had to be made out on the evidence where the pleaded facts essential to jurisdiction were not challenged by the defendant's evidence. It would be necessary for the defendant to introduce evidence, not merely to make denials or raise affirmative defences on the pleadings, before the plaintiff would be required to make an evidentiary response.

[29] I cannot find that the evidence of the applicants advances the matter beyond the statement of mere denials. Therefore, on the basis of the pleadings, the failure of the applicants to put in issue all of the allegations of the plaintiff, and a finding that the mere denials do not lessen the case for there being a good arguable case made out by the plaintiff, it is my finding that there is a real and substantial connection between the Yukon Territory and the subject matter of the litigation, and, as will be seen between the Yukon Territory and the French Defendants.

[30] In the alternative, I must turn to consider that if the allegations set out in the Statement of Claim are not supportable on the evidence of Marc Milward for the applicants, is it my finding that the respondent has produced evidence relevant to each of the defendants, which confirms a real and substantial connection.

[31] The respondent has filed affidavits of one Bojan Petrovic which set out a large number of documents relating to one or more of the French Defendants.

[32] It serves no good purpose, at this time, to detail each piece of documentary evidence which serves to support the plaintiff's claim of a good and arguable case, but I will recite a few:

- 1) Servier Canada was covered by an insurance policy taken out by LLS. LLS is considered to be the sole owner of the results of the study (Petrovic Affidavit No. 1, Exhibit 19).
- 2) Amerique, under its letterhead, retained Dr. Ezzat to study Ponderal for Servier Canada (Petrovic Affidavit No. 1, Exhibit 20).
- 3) Amerique responded to a request from Dr. Ezzat directed to Servier Canada (Petrovic Affidavit No. 1, Exhibit 20, p. 149).
- 4) A study by Dr. Mairi Blair of Ponderal undertaken in Canada was considered to be the sole property of LLS (Petrovic Affidavit No. 1, Exhibit 2).
- 5) Amerique directed a study by Dr. Blair in Canada, on drugs supplied by Servier Canada (Petrovic Affidavit No. 1, Exhibit 22, p. 177).
- 6) A letter from Servier Canada described "Our medical director at Servier Amerique, Doctor Brigitte Riveline" (Petrovic Affidavit No. 1, Exhibit 22, page 178).

- 7) LLS wrote a letter to Dr. Noble regarding a trial of Ponderal Pacaps, which is the name of the retarded form of Fenfluramine in Canada (Petrovic Affidavit No. 1, Exhibit 25, p. 199).
- 8) Dr. Noble was directed by LLS to submit his bill for his study on Ponderal Pacaps to Science Union (Petrovic Affidavit No. 1, Exhibit 25, pp. 202, 209). There is also evidence that Servier Canada inquired of Amerique as to whether the bill should be paid at that time.
- 9) A letter from LLS referring to "our Research People" (IRIS) indicating Dr. Riveline (Servier Amerique) had done the analysis (Petrovic Affidavit, Exhibit 25, p. 210).
- 10) A letter from Dr. Noble seeming to indicate that IRIS was the pharmaceutical company supplying the drug that he was analyzing for the Canadian market (Petrovic Affidavit No. 1, Exhibit 26, p. 215).
- 11) A letter from Amerique was sent to Dr. R.S. Murphey of A.H. Robins with respect to Robins' Canadian subsidiary accepting a caution with respect to Fenfluramine, signed by Dr. Derome-Tremblay and Dr. J. Servier (Petrovic Affidavit No. 1, Exhibit 33 p. 428).
- 12) A letter signed by Dr. Riveline, medical director of Amerique, on behalf of Servier Canada stating *inter alia*: "We remain strongly convinced that the use of Fenfluramine does not induce pulmonary hypertension." (Petrovic Affidavit No. 1, Exhibit 33, p. 430).

- 13) A letter from Amerique to “Bob” (Robert Essner, President of Wyeth-Ayerst Laboratories) which stated: – “Dr. Jacques Servier has also decided to suspend any further marketing of these drugs in other different countries and we will have time to talk about it, especially for Canada where you sell Pondimin and where we sell Ponderal.” (Petrovic Affidavit No. 1, Exhibit 39, p. 505).
- 14) Of considerable interest and of possible evidential value are the references to “Servier”, “Servier Group”, “Servier Research Group” and expansive description of the activities “Servier Research Group”. Throughout this document and the letterhead used, there is a symbol or a logo with the word Servier adjacent. (Petrovic Affidavit No. 1, Exhibit 45).
- 15) A memo from Science Union to *inter alia* Dr. Riveline, Dr. Derome-Tremblay “regarding the modifications to be made to the packaging of Redux for Canada.” (Petrovic Affidavit No. 1, Exhibit 51, p. 658, translation p. 657).
- 16) Memo from A.H. Robins to LLS regarding meeting with “Jacques Servier, M.D., Owner” and Dr. M. Derome-Tremblay, President, Servier Amerique, Dr. Brigitte Riveline, Medical Director, Servier Amerique (Petrovic Affidavit No. 1, Exhibit 50).

Dr. Servier has been following the developments closely with sympathetic understanding, realizing that this could happen to his company.

Servier is the largest independent, privately owned pharmaceutical company in France.

...

Servier is developing the d-isomer of fenfluramine for sale worldwide.

...

Robins is cooperating with Servier in the effort to maintain uniform labeling for fenfluramine worldwide. Partially as a result of this cooperation and the 25-year friendly relationships between our two companies, Servier appears willing to continue offering new products to us although we may not be number one on their list.

[33] This is a sample of the documents filed in support of the respondent's position. They indicate possible availability of evidence to support an argument that this is a joint venture by some or all of the French Defendants, or that they are acting jointly on one or more of the processes or functions of manufacturing, distributing, testing, marketing and selling the drugs Ponderal or Redux or one of them as alleged in the Statement of Claim.

[34] As indicated at the hearing, the evidence implicating or involving Biofarma is not as substantial as the others. Despite this, I am satisfied that the evidence relating to this company, with the failure on the part of the applicants to deny certain of the allegations made concerning Biofarma, leads to a conclusion that Biofarma has a real and substantial connection to the causes of action in this matter.

[35] Evidence has been produced that, at least, serves to support the argument that there is an entity referred to as "Servier", which, although perhaps used in an informal sense, may bind the French Defendants for the purposes of the plaintiff's argument of

the joint venture alleged. There is evidence, some of which is described above, which undoubtedly shows that the plaintiff has a good arguable case regarding each defendant.

[36] I now turn to the arguments that the service of the Writ was invalid and the requested declaration and order setting aside the writ. The manner of service serving here outside the jurisdiction is authorized by Rule 13 of the *Rules of Court*, which states:

Rule 13 – Service Outside [Yukon Territory] without leave

(13(1) Service of an originating process or other document on a person outside [Yukon Territory] may be effected without leave if

...

- (g) the proceeding is in respect of a breach, committed in [Yukon Territory], of a contract wherever made, even though the breach was preceded or accompanied by a breach, outside [Yukon Territory], which rendered impossible the performance of the part of the contract that ought to have been performed in [Yukon Territory],
- (h) the proceeding is founded on a tort committed in [Yukon Territory],

...

- (o) the claim arises out of goods or merchandise sold or delivered in [Yukon Territory],

[37] The writ was served upon the French Defendants *ex-juris* on the basis that the cause of action arose out of a tort allegedly committed in Yukon Territory, as well as a contract of sale and breach of such contract of sale taking place in the Yukon.

[38] I can find nothing of substance in the matter of the service of the Writ to authorize setting it aside or to declare it invalid.

[39] In conclusion with respect to jurisdiction *simpliciter*, it is my finding that there is a real and substantial connection, sufficient to find jurisdiction *simpliciter*, and that there is a good argument to be made in support of the position of the plaintiff. There are allegations in the Statement of Claim herein which have not been denied and which apply to each of the French Defendants. On the basis of all of the evidence and application to the law as spelled out earlier, I find that jurisdiction *simpliciter* has been established.

[40] Therefore:

1. This court declines to declare that service of the Writ of Summons herein upon the French defendants was invalid.
2. This court declines to order that the Writ of Summons herein be set aside.
3. This court declines to declare that it has no jurisdiction on the basis of jurisdiction *simpliciter*.

[41] As to the arguments relating to *forum conveniens*, the parties have argued their positions, both orally and in written briefs. I find that the applicants have not met the burden of showing France to be the more convenient forum and the factors compelling me to so conclude are:

- a) Evidence that the defendants' personnel, executives and potential witnesses regularly travel to North America.
- b) Involvement by the defendants in other litigation in North America and Canada specifically.
- c) The inconvenience to the plaintiff, her expert witnesses, her caregivers and counsel in traveling and staying in Europe.
- d) I perceive there to be difficulties to the plaintiff arising from proceedings in France in the French language, as opposed to proceedings in this bilingual country where both English and French proceedings are possible and common. In the applicants' brief, they spell out the factors to determine which forum is the most appropriate and they are:
 - ii) where each party resides;
 - iii) where each party carries on business
 - iv) where the cause of action arose;
 - v) where the loss or damage occurred;
 - vi) convenience or inconvenience to potential witnesses;
 - vii) cost of conducting the litigation of conducting the litigation in this jurisdiction;

- viii) applicable substantive law;
- ix) difficulty in cost approving foreign law, if necessary;
- x) whether there are parallel proceedings in any other jurisdictions (*Stern v. Dove Audio Inc.* [1994] B.C.J. No. 863.)

An examination of these factors, in light of the evidence before me, shows that on virtually every factor the convenience favours the Yukon jurisdiction.

[42] Therefore, I decline to declare that the *forum conveniens* for the matter to be tried is France and will not interfere with my earlier finding that jurisdiction is in this court.

[43] Through their counsel, the French Defendants have submitted somewhat lengthy arguments with respect to *forum conveniens* relating to Article 15 of the French Civil Code and fairness and justice. Having regard to the global scope of the activities of the French Defendants and the other evidence that I have referred to herein, and recognizing that the alleged tort and other causes of action are said to have arisen in the Yukon Territory, and that the damages that may have been incurred were allegedly incurred in the Yukon Territory, these submissions do not succeed. The arguments based on Article 15 lose their impetus if the plaintiff is prepared to forego enforceability of any judgment in France and counsel for the plaintiff expressed a willingness to do so.

[44] As to fairness and justice, I cannot, with the greatest of respect, agree with the defendant's submissions, paragraph 81 of their brief, which states:

As such, the Applicants submit that a reasonable measure of fairness and justice sufficient to meet the reasonable expectations of the national and international communities would not be preserved if this Honourable Court exercised jurisdiction over any of the Applicants.

For many reasons, including global extent of the operations of all of the French defendants according to the evidence, I cannot accept this submission.

[45] In conclusion the applications made by the French Defendants are hereby dismissed with costs to the plaintiff in any event of the cause from the defendant applicants.

Hudson J.

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David A. Klein

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Brent Johnston