

COURT FILE NO.: 00-CV-195906CP
DATE: 20040116

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
ERIK ANDERSEN, YVONNE ANDERSEN, and SHARON FROST)	<i>James M. Newland, Gavin MacKenzie, Russell M. Raikes and John Makins, for the Plaintiffs/Moving Parties</i>
)	
Plaintiffs/Moving Parties)	
)	
- and -)	
)	
ST. JUDE MEDICAL INC., and ST. JUDE MEDICAL CANADA, MC .)	<i>S. Gordon McKee, Jill M. Lawrie, J.A. Prestage and Camille Lemieux, for the Defendants/Respondents</i>
)	
Defendants/Respondents)	
)	
)	<i>HEARD: June 16, 17, 19 and 20,2003 and January 14,2004</i>

ADDITIONAL REASONS FOR DECISION

CULLITY J.

{1} In response to the request in my reasons released on September 16, 2003, counsel provided helpful and comprehensive submissions on the outstanding matters relating to the class definition and the proposed litigation plan. Further submissions on one of the matters relating to the definition of the class were made orally on January 14, 2004.

- 2 -

The class

[2] Two aspects of the class definition were to be dealt with. One concerned interprovincial differences in the legal rights of the proposed family members class; the other to the suggested special position of asymptomatic members of the patients' class who were residents of Alberta. I accept the submission of plaintiffs' counsel that the latter need not be dealt with at this stage. On the basis of the record and the submissions that have been made, I am not satisfied that residents of Alberta who received Silzone implants will be unable to prove that they have suffered losses that are not covered by the health insurance scheme administered by the government of that province and, on that ground, that they should be excluded from the class for the purpose of certification of the proceedings. Their claims will be advanced by a trial of the common issues and the possibility that some, or even all of them, may not be able to prove that they suffered damage is a matter that goes to the merits of the claims made on their behalf and is not one to be determined on this motion.

[3] In their further submissions, the plaintiffs proposed that the family members class should be restated as follows:

Family members of Silzone device recipients, pursuant to s. 61 of the Family Law Act R.S.O. 1990, c. F.3,

[4] Initially, I understood the new definition to be intended to refer merely to the classes of persons described in section 61 (1) of the Family Law Act. In their response, however, counsel for the defendants understood the proposed redefinition to involve an assumption that section 61 would apply to family members whether the Silzone recipients to whom they are, or were, related received the device in Ontario or elsewhere in Canada, and irrespective of their province, or territory, of residence. Defendants' counsel disputed the validity of an assumption that the laws of Ontario would govern all questions of liability that would arise in the action. I understood counsel for the plaintiffs to indicate in their further submissions in reply, that defendants' counsel had correctly interpreted the proposed redefinition of the family members class and that it was, indeed, the plaintiffs' position that the laws of Ontario would apply to determine the defendants' liability to each member of the family class.

[5] The question of choice of law is important because, although the defendants' have not yet pleaded, it has not been disputed that interprovincial legal differences exist and, in particular, that the laws of other relevant Canadian jurisdictions restrict claims analogous to those in section 61 of the Family Law Act to family members of deceased persons. There are also variations in the categories of family members who can make such claims with those in section 61 being the most extensive. The question was not addressed to any appreciable extent at the hearing of the motion as plaintiffs' counsel wished to give further consideration to the significance of the relevant interprovincial differences.

[6] I do not believe it is necessary, or appropriate, to resolve the question of choice of law on this motion. It should be determined as an individual issue with respect to each claimant family

- 3 -

member in the light of the particular factors connecting the related patient to Ontario, or some other jurisdiction, as well as the findings of fact made at the trial of the common issues. For this purpose, I accept the submission of plaintiffs' counsel that the family members class should be defined in terms that include all of the categories of relationships referred to in section 61. I would, however, limit the class definition so that it refers only to the categories of family members contained in the section and does not beg the question of choice of law.

[7] The fact that, if the defendants are correct in their submission that the law of Ontario will not apply to all the members of the class, this will mean that some will have no claim is not sufficient, in my opinion, to make the class over-inclusive. In any class action where there are individual issues that relate to liability some members of the class may ultimately be unsuccessful in establishing their claims. The question of choice of law is simply an individual issue on which the success, or failure, of the claims of members of the family class may depend.

[8] The objection to an overly-broad class referred to by the Chief Justice in *Hollick v. City of Toronto* (2001), 205 D. L. R. (4th) 19 (S.C.C.), at page 31 was to one that could have been "defined more narrowly without arbitrarily excluding some people who share the interest in the resolution of the common issues". I am satisfied that a more narrow definition than that I have accepted might well arbitrarily exclude some family members who would have derivative claims under the applicable laws.

[9] Nor would this be a case like *Mouhteros v. DeVry Canada Inc.*, (1998), 41 O.R. (3d) 63 (G. D.) in which the court was satisfied that, irrespective of the findings made on the common, and the individual, issues, some members of the proposed class would have no cause of action. Even if, as defendant's counsel submitted, some members of the class will not be able to rely on the *Family Law Act*, I would not consider this to be a reason for denying certification in respect of all, or any, of such class members. The determination of the particular members of the class who can, or cannot, claim under Part V - or under one of the fatal accidents statutes of other provinces - will depend on the resolution of a legal issue relating to choice of law and the factual issues that are found to be relevant to that question in each case and to their entitlement under whichever of the statutes is applicable.

[10] Accordingly, I would define the family members class as follows:

Persons who, by reason of their relationships with members of the patients' class would have standing in this action pursuant to section 61 (1) of the *Family Law Act* R.S.O. 1990, c. F 3, as amended, if that section was otherwise applicable to the claims asserted on their behalf.

[11] For greater clarity, I am revising the first of the reformulated common issues, as set out in paragraph 63 of the earlier reasons, to insert "patients' " immediately before the words "class members" in the first line.

- 4 -

The litigation plan

[12] The revised and expanded litigation plan that was filed on behalf of the plaintiffs was revised further in response to the criticisms made by defendants' counsel. To a large extent these criticisms reiterate those made at the hearing of the motion in support of counsels' submissions that the resolution of the common issues would not substantially advance the plaintiffs' case given the difficulty and complexity of the individual issues that would remain to be resolved.

[13] Defendants' counsel were also heavily critical of the proposals for mandatory mediation and the appointment of referees. While I do not believe any of these criticisms can be dismissed as trivial, counsel were, in my opinion, appealing to too high a standard. The litigation plan is important at this stage because it may throw light on the extent to which a resolution of the common issues will advance the proceeding, whether a class proceeding is otherwise the preferable procedure and whether it is reasonable to conclude that there will be manageable procedures for resolving the individual issues.

[14] The more recent submissions of defendants' counsel do not alter the opinions I expressed on the first two of these matters in my earlier reasons. As far as the third of them is concerned, the ultimate decision on the procedures to be followed in determining the individual issues is to be that of the judge who tries the common issues but only, of course, if certain of them are decided in favour of the plaintiffs. At this stage, the plan must necessarily be tentative and, for that reason, not all procedural details need be provided. Its purpose is to assist the motions judge to make a practical judgment "on the basis of, among other things, a costs/benefit analysis" on the fundamental question whether the goals of the legislation will be served by certification. A costs/benefits analysis is important because certification will not be justified if a resolution of the common issues in favour of the plaintiffs will not advance their case sufficiently to enable them to pursue their claims for compensation by dealing with the remaining individual issues efficiently and economically.

[15] On the basis of the evidence, I see no reason to conclude that, even if none of the alternative procedures proposed by the plaintiffs is adopted and the remaining individual issues - including questions of causation and the assessment of damages - are to be tried, the cost of doing this is likely to be excessive given the amounts that would be recoverable. This is a very different case than those in which the evidence indicated that the amounts likely to be recovered by many members of the class would be far outweighed by the cost of enabling them to do so.

[16] Whether mediation may be cost-efficient and suitable for all, or at least some, of the claims, whether certain of the individual issues can, and should, be referred and others tried or whether individual trials would be appropriate in all cases for all of the individual issues cannot be determined at this stage. As counsel for the plaintiffs submitted:

...the Class Proceedings Act permits the court to tailor the procedure to be followed for the most efficient resolution of claims. Again, whether

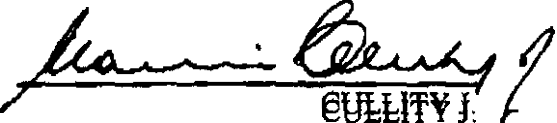
- 5 -

mandatory mediation should be applied to all class **members** or only to some class members ought to be **determined at** the conclusion of the common issues trial, by which **date there** will be a **better** understanding of the number of patients **who have** suffered complications relating to the Silzone **versus** those who are asymptomatic but require **increased** monitoring. The **litigation plan** is not **carved in stone** but **may** be adapted **as needed as further** medical and other information becomes available.

[17] The plaintiffs **have satisfied me that** the concerns I asked them to **address** have been dealt with adequately. Counsel should consult with respect to the other aspects of the **litigation plan** referred to in **paragraph 74** of my reasons and with respect to the **terms** of the order to be signed and entered. If agreement cannot be reached, a case conference **will be** arranged to deal with these **points of detail** as well as with the **form** and contents of the notice to be **given to class members**. In view of the definition of the family members **class**, counsel **might** consider the appropriateness of **including** in the notice a note such as the following:

The **claims** of family members **may** depend upon whether the **laws** of **Ontario** or those of some **other** jurisdiction - for example, the province where the Silzone **device was** implanted - are applicable. This legal question will be determined on a **case by case** basis.

[18] Any submissions of the plaintiffs with respect to the **costs** of the proceeding to date should be **made**, in writing, **within 14 days** of the release of these additional **reasons**. The **defendants will have an** additional **14 days** to **respond**. Any reply submissions of the plaintiffs should be provided **within a** further seven days.


GULLITY J.

Released January 16, 2004

COURT FILE NO.: 00-CV-195906CP
DATE: 20040116

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

**ERIK ANDERSEN, YVONNE ANDERSEN, AND
SHARON FROST**

Plaintiffs/Moving Parties

- and -

**ST. JUDE MEDICAL INC., and ST. JUDE
MEDICAL CANADA, INC.**

Defendants/Respondents

ADDITIONAL REASONS FOR DECISION

CULLITY J.

Released: January 16, 2004