



***THE COURT OF APPEAL FOR SASKATCHEWAN***

Citation: 2010 SKCA 100

Date: 20100826

Between:

Docket: 1928

DJO Canada, Inc. and DJO, LLC

Prospective Appellants (Defendants)

- and -

Sean Schroeder, Eleanore Smiroldo, as Litigation  
Guardian for Eden Bobyk and Allister Curtis Veinot

Prospective Respondents (Plaintiffs)

- and -

McKinley Medical LLC, McKinley Medical Corporation  
and Curlin Medical Inc.

Prospective Respondents (Defendants)

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Between:

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McKinley Medical, LLC, McKinley Medical Corporation  
and Curlin Medical Inc.

Appellants (Defendants)

- and -

Sean Schroeder, Eleanor Smiroldo, as Litigation  
Guardian for Eden Bobyk and Allister Curtis Veinot

Respondents (Plaintiffs)

- and -

DJO Canada, Inc. and DJO, LLC.

Respondents (Defendants)

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Before:

Klebuc C.J.S. (in Chambers)

Counsel:

Gordon J. Kuski, Q.C. and Amanda M. Quayle for DJO Canada, Inc.  
and DJO, LLC

Douglas Lennox for Sean Schroeder, Eleanore Smiroldo, as  
Litigation Guardian of Eden Bobyk and Allister Curtis Veinot  
Peter J. Cavanagh and Neil S. Rabinovitch for McKinley Medical  
LLC, McKinley Medical Corporation and Curlin Medical Inc.

Application:

From: 2010 SKQB 125

Heard: June 23, 2010

Disposition: Allowed in part

Written Reasons: August 26, 2010

By: The Honourable Chief Justice Klebuc

## **KLEBUC C.J.S.**

### **I. Introduction**

[1] DJO Canada, Inc., DJO, LLC, McKinley Medical LLC, McKinley Medical Corporation and Curlin Medical Inc. are the defendants in Q.B.G. No 247 of 2008, J.C. Saskatoon, which Popescul J. certified as a class-action by order and judgment dated March 29, 2010.

[2] DJO Canada, Inc. and DJO, LLC (“the DJO Parties”) seek leave to appeal the certification order pursuant to s. 39(3)(a) of *The Class Actions Act*, S.S. 2001, c. C-12.01. The proposed appeal is based on the following grounds:

4. (a) The learned Chambers Judge erred in law in determining pursuant to section 6(1)(d) of the CAA [*The Class Actions Act*], that a class action would be the preferable procedure for the resolution of the common issues and accordingly erred in certifying the action as a class action, including:

(i) The learned Chambers Judge erred in law in determining that a class proceeding would be a fair, efficient and manageable method for advancing the claim; and

(ii) The learned Chambers Judge erred in law in determining that a class proceeding would be preferable to other procedures;

(b) The learned Chambers Judge erred in law in certifying a class of all persons resident in Saskatchewan and elsewhere in Canada pursuant to section 6.1 of the CAA, in the absence of any or sufficient basis in fact that there are class members resident in any Province of Canada other than Saskatchewan and British Columbia;

(c) The learned Chambers Judge erred in law in certifying a class of all persons resident in Saskatchewan and elsewhere in Canada pursuant to section 6.1 of the CAA where the facts on the application for certification were that 28 of 29 of the identified potential class members are resident in Saskatchewan and had knee or shoulder surgery performed by one of three orthopedic surgeons who all practice together in the same clinic in Saskatoon, Saskatchewan, and where the sole remaining identified potential class member resident in British Columbia had surgery performed almost two years after the last of the patients who had surgeries performed by one of the Saskatoon surgeons;

(d) The learned Chambers Judge erred in law in determining pursuant to section 6(1)(c) of the CAA that the claims of the class members raise common issues that justify a class action, including that a determination of whether "the DonJoy Pain

Control Device cause[s] chondrolysis when placed in the synovial cavity of a knee or shoulder following surgery?" will significantly advance the litigation;

(e) The learned Chambers Judge erred in law in certifying common issues for the subclass of Saskatchewan residents relating to *The Consumer Protection Act*, S.S. 96, c. C-30.1, where no authentic or genuine cause of action pursuant to *The Consumer Protection Act* exists as required pursuant to section 6(1)(a) of the CAA; ...

[3] McKinley Medical LLC, McKinley Medical Corporation and Curlin Medical Inc. (“the McKinley Parties”) also seek leave to appeal the aforementioned certification order and substantially rely on the same grounds as the DJO Parties. Accordingly, in these reasons I will deal with both applications, being C.A. 1928 and C.A. 1929.

## **II. Background**

[4] The following are essentially the facts outlined by the McKinley Parties in their brief of law.

[5] The McKinley Parties manufactured a pump known as the “DonJoy Pain Control Device” (herein called the “pain pump”). The DJO Parties distributed the pain pump in Canada between January 1, 2004 and December 30, 2008.

[6] The pain pump is a disposable, portable, non-electronic device that systematically infuses an anaesthetic through a special catheter implanted into the wound site by the surgeon. The pain pump is sold with an empty reservoir. The surgeon chooses the type of medication and the rate that medication is to be infused into the patient. The main advantage of the pain pump is that it allows patients to have continuous pain relief for extended periods of time

following surgery, without the side effects associated with systemic narcotic analgesics.

[7] The DJO Parties sold the pain pump solely to hospitals and healthcare facilities. No direct-to-consumer advertising of the pain pump was undertaken by any of the prospective appellants. Furthermore, none of the prospective respondents saw any literature or marketing material, or a pain pump before it was implanted by the surgeon.

[8] The surgery for each prospective respondent (in the case of Ms. Smiroldo, her daughter) was performed by the same orthopaedic surgeon in Saskatoon. According to the prospective respondents, the surgeon recommended the use of the pain pump as a pain control device and, in the course of surgery, inserted the pain pump catheter into a synovial cavity and filled the pump with an anaesthetic. The decision whether to use the pain pump was a decision made by the surgeon and his or her patient. The surgeon also determined what size of reservoir of the pain pump is appropriate for a given patient, and how and where it should be placed.

[9] There is no suggestion that the pain pump is defectively manufactured or that it failed to function, as designed.

[10] The evidence confirms that there are 29 persons who want to pursue a claim against the prospective appellants by means of a class action. Of those individuals, 28 reside in Saskatchewan and one resides in British Columbia. All of the potential claimants resident in Saskatchewan had shoulder or knee

surgery performed by one of three surgeons practicing in the same surgical group in Saskatchewan.

[11] No material evidence was produced regarding the number of pain pumps sold in Canada or of the number of patients who were adversely affected by its use.

### **III. Reasons Appealed From**

[12] The prospective respondents advanced two causes of action in their statement of claim: damages based on a breach of a duty of care the DJO Parties owed to potential users of the pain pump; and damages arising out of breaches of *The Consumer Protection Act*, S.S. 1996, c. C-30.1 (the “CPA”), by the DJO Parties and the McKinley Parties. The Chambers judge held that the prospective respondents have established a cause of action in negligence. At para. 34, he stated:

[34] Whether or not to the pain pumps "caused" the chondrolysis or whether it was other factors, or a combination of factors, which were the legal "cause" of the alleged condition, is not an issue that should be determined at the certification stage. The resolution of that issue must occur after the trier of fact has had the benefit of hearing evidence called at trial. At this point in the process, the plaintiffs need only persuade the Court that they have set forth in their claim an apparently authentic or genuine cause of action. I find that the plaintiffs have met that criterion and, with respect to the negligence cause of action, have satisfied the requirements of s. 6(1)(a) of the Act.

[13] With respect to the cause of action based on breaches of the CPA, the Chambers judge considered and rejected the submissions advanced by the prospective appellants including submissions that: (a) a pain pump is not a consumer product; (b) the defendants are not retail sellers or manufacturers for the purposes of the CPA; and (c) no sale occurred within the meaning of

the *CPA*. However, the Chambers judge agreed that only Saskatchewan residents are entitled to the benefits of the *CPA*, and thus, created a Saskatchewan subclass which would be entitled to the benefit of the *CPA*.

#### IV. Leave Application Criteria

[14] The relevant criteria for granting leave are succinctly articulated by Cameron J.A. of this Court in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2002 SKCA 119, 227 Sask. R. 121 at para. 6:

[6] The power to grant leave has been taken to be a discretionary power exercisable upon a set of criteria which, on balance, must be shown by the applicant to weigh decisively in favour of leave being granted: *Steier v. University Hospital Board*, [1988] 4 W.W.R. 303 (Sask. C.A., *per* Tallis J.A. in Chambers). The governing criteria may be reduced to two—each of which features a subset of considerations—provided it be understood that they constitute conventional considerations rather than fixed rules, that they are case-sensitive, and that their point by point reduction is not exhaustive. Generally, leave is granted or withheld on considerations of **merit** and **importance**, as follows:

First: Is the proposed appeal of **sufficient merit** to warrant the attention of the Court of Appeal?

- Is it *prima facie* frivolous or vexatious?
- Is it *prima facie* destined to fail in any event, having regard to the nature of the issue and the scope of the right of appeal, for instance, or the nature of the adjudicative framework, such as that pertaining to the exercise of discretionary power?
- Is it apt to unduly delay the proceedings or be overcome by them and rendered moot?
- Is it apt to add unduly or disproportionately to the cost of the proceedings?

Second: Is the proposed appeal of **sufficient importance** to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal?

- does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?
- does it raise a new or controversial or unusual issue of practice?
- does it raise a new or uncertain or unsettled point of law?

- does it transcend the particular in its implications?

[Emphasis in original]

[15] The merits of the decision by the Chambers judge are only relevant on this leave application to the extent they relate to the governing criteria set out in *Rothmans, Benson & Hedges, supra*.

## V. Analysis

[16] The following questions arise out of the submissions made by the prospective appellants and the prospective respondents:

- (1) Does the *CPA* give rise to a cause of action within the meaning of s. 6(1)(a) of *The Class Actions Act*?
- (2) Do the claims by the proposed class members constitute common issues which justify a class action?
- (3) Is a class action the preferable procedure for the resolution of the common issues certified by the Chambers judge?
- (4) Would a class action proceeding be a fair, efficient and manageable method for advancing the claims raised by the prospective respondents?

[17] That said, I turn to applying the requirements prescribed by *Rothmans, Benson & Hedges*, to each of the aforementioned questions.

### **(1) Does the *CPA* give rise to a cause of action within the meaning of s. 6 (1)(a) of *The Class Actions Act*?**

[18] With respect to the first criterion in *Rothmans, Benson & Hedges, supra*, I am satisfied that there is a basis on which to question whether a manufacturer

or distributor of medical equipment is a “retail seller” which sells goods usually used for “personal” use.

[19] The *CPA* was enacted to correct the power imbalance in consumer transactions. Thus, the question of whether the *CPA* imposes liability on manufacturers and distributors of medical equipment, as it does on a “retail seller” of goods used for “personal” use, is a valid one to be considered having regard to the scheme of legislation, the intention of the Legislature, and the modern approach for the interpretation of legislation outlined in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, and relevant jurisprudence. As for the jurisprudence, there appears to be some reluctance on the part of Canadian courts to extend strict liability from sale of goods legislation to transactions for equipment used in a medical setting. See: *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 at paras. 100-102 and *Hollis v. Burch*, [1990] B.C.J. No. 1059 (QL).

[20] I am further satisfied that the aforementioned question is neither frivolous nor vexatious, nor destined to fail. Nor should consideration of the question by this Court unduly delay the subject class action.

[21] An early adjudication of law underpinning this question would be of benefit to all parties. If the position advanced by the prospective appellants is sustained by the Court, they would be relieved of the burden and related costs of preparing a defence to a non-existent cause of action. Conversely, if this Court holds that the *CPA* does provide a cause of action for the prospective respondents based on undisputed evidence before the Chambers judge, the question need not be addressed during the trial.

[22] I am further satisfied that the submissions raised by the prospective appellants are of sufficient importance to the administration of justice to warrant leave being granted on the first question.

[23] With respect to the remaining questions, I am satisfied that they are not of significant importance to the proceedings before the trial court or the state of the law or as to warrant determination by this Court. These questions were thoroughly addressed by the Chambers judge and dealt with in a manner consistent with the established body of jurisprudence applicable thereto. Moreover, the prospective appellants have not sought leave to appeal from the Chambers judge's finding that the prospective respondents have a cause of action based on a breach of duty of care.

## **VI. Conclusion**

[24] The DJO Parties and the McKinley Parties are given leave to appeal solely on the first ground. Their applications are dismissed in all other respects.

DATED at the City of Regina, in the Province of Saskatchewan, this 26th day of August, A.D. 2010.

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"Klebuc C.J.S."  
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Klebuc C.J.S.