IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jones v. Zimmer,*
2010 BCSC 1504

Date: 20100923
Docket: S095493
Registry: Vancouver

Between:

Dennis Jones and Susan Wilkinson

Plaintiffs

And:

Zimmer GmbH, Zimmer, Inc., and Zimmer of Canada Limited

Defendants

Before: The Honourable Madam Justice Loo

Oral Reasons for Judgment

Counsel for the Plaintiffs:	D. A. Klein J. Z. Murray
Counsel for the Defendants:	T. M. Pontin A. Borrell
Place and Date of Hearing:	Vancouver, B.C. September 13-14, 2010
Place and Date of Judgment:	Vancouver, B.C. September 23, 2010

[1] **THE COURT:** This action was commenced on July 24, 2009 by the plaintiffs, Dennis Jones and Susan Wilkinson, under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, concerning the Durom Acetabular Component hip implant, or Durom Cup, that was developed, manufactured, distributed and marketed by one or more of the defendants ("Zimmer").

[2] The Durom Cup is a non-cemented cup designed to act as an artificial joint socket by allowing the patient's bone to grow into or around it.

[3] The plaintiffs were implanted with the Durom Cup during hip surgery, but allege that the cup was defective by failing to properly heal or adhere to the surrounding bone, thereby causing excruciating pain. Both plaintiffs had revisions, or further surgery, to remove the Durom Cup and to replace the cup with another hip implant.

[4] The plaintiffs allege that Zimmer was negligent, and its negligence includes negligent manufacturing and/or marketing; failing to adequately test or to do follow-ups to monitor or to warn; and incorrectly blaming the Durom Cup failures on surgical error.

[5] Zimmer has not filed a statement of defence or response to civil claim.

[6] This application is brought prior to the certification hearing scheduled for February 7, 2011. Zimmer seeks the medical records of the physicians and the hospitals relating to the plaintiffs' implant surgeries and revision surgeries. One of the physicians has voluntarily provided his medical records, but the remaining physicians and the hospitals take no position.

[7] Zimmer's application is opposed by the plaintiffs.

[8] Zimmer has filed no evidence in support of its application, but argues that the plaintiffs' medical records are required for the certification application. It argues that the medical records may disclose that the surgical techniques for both plaintiffs were not common, in which case the records will assist Zimmer in arguing against

certification. The plaintiffs' medical records may also assist in determining whether punitive damages should be certified as a common issue.

[9] The plaintiffs contend that the certification record is more than adequate, that much of the documentary evidence comes from Zimmer, including its review of over 3,100 cases, that nothing in the plaintiffs' medical records will assist on the issues of commonality or lack of commonality, and that whether the plaintiffs' respective surgeons followed the proper surgical techniques or not will be dealt with at the individual damage stage, but not at the certification stage.

[10] A class action is a multistage process that starts with a certification hearing, a determination of the common issues for a class and any subclass, and then, lastly, the individual issues. The common issues at the initial certification stage must not be confused with the individual issues at the last stage: s. 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50; *Harrington v. Dow Corning*, 2000 BCCA 605 at paras. 42-46; *T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2010 ABQB 203 at para. 16.

[11] The certification stage is procedural. It focuses on the form of the action and whether the action is properly a class action. The issue on the certification stage is not whether the plaintiffs' claim is likely to succeed: *Hollick v. Toronto City*, [2001] 3 S.C.R. 158, 2001 SCC 68 at para. 16.

[12] On May 21, 2010 the plaintiffs delivered to Zimmer their notice of motion and supporting affidavits, including the affidavit of Dr. Nizar Mahomed, an orthopaedic surgeon. The notice of motion seeks certification of four common issues:

> 1. Was the Durom Cup defective and/or unfit for its intended use?
>
> 2. Did any of the defendants breach a duty of care owed to class members and, if so, when and how?
>
> 3. Should any of the defendants pay punitive damages and, if so, to whom should they be paid, and in what amount?

> 4. With respect to British Columbia residents, did any of the defendants breach a statutory duty under the *Business Practices and Consumer Protection Act*, R.S.B.C. 2004, c. 2, owed to class members who received the Durom Cup implant in British Columbia and, if so, when and how?

[13] Following a case management conference on June 1, 2010 the case management judge, Mr. Justice Bowden, ordered on June 25, 2010 the following schedule for the certification motion:

> 1. Zimmer is to deliver affidavits in response to the plaintiffs' certification application by October 1, 2010.
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> 2. The plaintiffs are to deliver any affidavits in reply and their argument in support of the certification application by November 6, 2010.
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> 3. Zimmer is to deliver its argument by December 10, 2010.
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> 4. The plaintiffs are to deliver their reply by January 7, 2011.
>
> 5. The certification hearing will commence on February 7, 2011.

[14] Zimmer has had the plaintiffs' material in support of their application for certification for close to four months, but did not file or bring this application until August 27, 2010. It has not sought to vary the schedule ordered by Bowden J., but if it succeeds on this application there is no doubt that the schedule cannot be met.

[15] Zimmer relies on two cases where medical records were ordered prior to certification: *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314, and *Schroeder v. DJO Canada Inc.*, 2009 SKQB 169.

[16] *Caputo* was a tobacco class action case. The evidence in support of the application for certification was only a solicitor's affidavit based on information and belief. Mr. Justice Winkler (as he then was) found that evidence from the plaintiffs themselves was required in order to develop a sufficient evidentiary record, and

allowed the defendants to examine the plaintiffs on the issue relevant to certification and to obtain medical records for use on the examination.

[17] The medical records in *Caputo* were not ordered in isolation, but in conjunction with an examination for discovery of the plaintiffs because the record was exceedingly sparse.

[18] In *Schroeder*, Mr. Justice Popescul allowed the defendants, prior to certification, to cross-examine two plaintiffs and a medical expert who had filed affidavits in support of the certification application. He also allowed pre-certification disclosure of the plaintiffs' relevant medical records in advance of the cross-examination.

[19] Mr. Justice Popescul, in exercising the court's discretion, recognized that the question to be asked is whether the cross-examination will assist in the ultimate determination on the certification application. He granted the applications to "ensure that an adequate evidentiary record is before the court" (para. 50), but went on to state at para. 59:

> ... What remains to be seen is what, if anything, will be found by the defendants that could be relevant to the issues to be determined at the certification hearing. However, it is wrong, in my view, to deny the defendants, in these circumstances, the opportunity to examine information with a view to determining if and how it ought to be presented in the certification hearing.

[20] The plaintiffs refer to decisions where an application for production of medical records prior to certification has been refused.

[21] In *Pearson v. Inco Ltd.*, 22 C.P.C. (5th) 167, 113 A.C.W.S. (3d) 769 (O.S.C.J.), the plaintiff claimed that Inco's refinery emitted toxic and hazardous substances that caused severe and widespread damage to the physical and emotional health of the proposed class members. The plaintiff filed an affidavit stating that he suffered various ailments and was told by his doctor that his ailments were consistent with exposure to Inco's contaminants. Mr. Justice Nordheimer, in refusing production, stated at para. 12:

> In the end result, there are likely to be two results if the medical records are produced. One is that they will reveal nothing more than the defendants already know and will be of no use on the certification motion at all. The other is that they will reveal information which might cast doubt on the merits of the plaintiff's claim but that is an impermissible use of the records at this stage of the proceeding. Either way, the medical records will not advance the consideration of the issues which are relevant to the certification motion, in that they will not assist in determining whether there are common issues nor will they assist in determining whether a class action is the preferable procedure for the resolution of any common issues. I therefore refuse Inco's request for production of the medical records.

[22] In *Anderson v. Wilson*, 18 O.T.C. 79, 7 C.P.C. (4th) 244 (Gen. Div.), the plaintiffs claimed they contracted Hepatitis B while under the medical care of the defendant and other doctors. Mr. Justice Jenkins refused the defendant's application for the plaintiffs' medical records prior to certification on the basis that while the issue of causation may be relevant when dealing with the merits of the individual claims, the medical records are not relevant on the application for certification.

[23] *Pardy v. Bayer Inc.*, 2003 NLSCTD 130, 42 C.P.C. (5th) 362, was a product liability case. The plaintiffs claimed that a drug caused serious side effects, including kidney failure and death. The defendant sought the plaintiffs' medical records prior to certification. In refusing production, Mr. Justice Mercer (as he then was) stated that the primary concern on an application for discovery or production prior to certification was the adequacy of the record which will vary in the circumstances of each case. He stated at para. 41:

> ... There are two aspects to be considered, potential relevance to an issue before the Court and the adequacy of the evidentiary record on the issue without the requested discovery. There is an onus upon a party seeking discovery at that stage to show that the discovery will likely assist in the resolution of an issue before the [C]ourt. The mere assertion that discovery of certain documents is required will not suffice, unless it is plain that such documents are germane to an issue before the Court. Furthermore where there is an adequate evidentiary record discovery may be refused prior to certification. An inadequate evidentiary record would constitute an "exceptional" or "extraordinary" circumstance warranting discovery at that stage.

[24] Mr. Justice Mercer further stated at para. 48:

> The medical records of the Plaintiffs are clearly relevant to the merits of their individual claims but, as noted above, the certification stage is not meant to determine the merits of the action. Indeed the Court must be vigilant to ensure that the certification application does not become mired down in the merits of an individual claim.

[25] On the application before me Mr. Klein for the plaintiffs contends that case law in Saskatchewan has developed differently than in the other provinces that have similar legislation. The lower threshold is reflected in the fairly recent April 8, 2010 decision of Popescul J. in *Thorpe v. Honda Canada, Inc.*, 2010 SKQB 136, where he stated at para. 12:

> ... [I]t is a fair observation that courts in this jurisdiction have been quite generous in the exercise of the courts' discretion in favour of granting such requests, resulting in frequent orders permitting defendants to cross-examine the plaintiff's affiants. This could be as a result of a recognition that certification, albeit just a procedural step in a process, can have a significant impact on the parties and a willingness to err on the side of too much information, rather than not enough.

[26] Mr. Justice Popescul refused the defendant's application to cross-examine the plaintiff and for the plaintiff to produce her Honda vehicle or its service records, on the basis that to do so would not clarify the issues relevant to the certification application and require an adjournment of the scheduled application for certification.

[27] The plaintiffs contend that the test in British Columbia is enunciated in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2007 BCSC 1663. There the plaintiffs sought document production for the certification application, in particular, that Microsoft produce documents from litigation in the United States. Mr. Justice Meyers, after reviewing case law, stated at para. 25:

> ... It appears to me that at the certification stage of a class proceeding, a party must justify the need for document disclosure. It must show that the sought-after documents would inform the certification process. I do not say the onus is a high one: that is not an issue I need address because I do not think the plaintiffs have even met a low threshold here.

[28] From my review of authorities, I accept that generally the courts in Canada have refused to order that medical records be produced prior to certification, except in exceptional circumstances, including where the record on the certification issue

may be inadequate. The party requesting production has the onus of demonstrating that the documents are necessary for the certification application.

[29] In this case, the existing record discloses that following warnings and complaints about the Durom Cup, Zimmer conducted its own detailed investigation, and on July 22, 2008 recalled the Durom Cup in the United States by a notice to surgeons. The notice stated that Zimmer had investigated and examined the clinical and radiographic data of more than 3,100 cup implant patient cases from a total of 12 clinical sites in the United States and Europe. A key conclusion was "that additional surgical technique instructions and training are necessary in the United States". The notice strongly recommend that U.S. surgeons stop implanting the Durom Cup until they had received the additional training.

[30] After the statement of claim was filed on October 13, 2009, Zimmer issued an Urgent Field Safety Notice to users of the Durom Cup in Europe. The notice stated that following Zimmer's widespread clinical investigations in Europe into the cause of revisions in Europe and Canada, it concluded "the most probable root cause is the use of a surgical technique which differs from that prescribed". Additional training was to be provided to surgeons by a DVD, followed by a "knowledge check". On November 15, 2009 the Durom Cup was recalled in Canada. Heath Canada in its Medical Device Recall Listings states under the reason for recall that there have been reports of revisions of the Durom Cup and that "Based on Zimmer's investigation, the most probable cause is using a surgical technique which differs from that prescribed in the surgical technique for the Durom Acetabular Cup."

[31] Dr. Mahomed reviewed four documents: Zimmer's July 22, 2008 recall notice; a medical article published in September 2009 by three authored physicians (one or more of whom are noted to have received funding from Zimmer) on the failure of the Durom Cup; the European recall notice of October 13, 2009; and the November 15, 2009 Health Canada medical recall list.

[32] In answer to certain questions that were posed to Dr. Mahomed by the solicitors for the plaintiffs, Dr. Mahomed wrote that the documents "point towards surgical technique as the cause of failure for the implants".

[33] In its application response on September 2, 2010 the plaintiffs filed an affidavit that appended the June 9, 2010 decision of the United States Judicial Panel on Multidistrict Litigation. The decision indicates that there are at least 45 actions in the United States federal district courts by plaintiffs alleging injury as a result of the Durom Cup. The seven-judge panel ordered that all 45 actions be "centralized" as they involve common issues of fact: that is, whether the Durom Cup was defectively designed and/or manufactured, and whether Zimmer failed to provide adequate warning. In opposing the motion for centralization, by its brief filed on April 9, 2010 Zimmer stated that it had conducted a thorough review of clinical outcomes and thousands of cases worldwide.

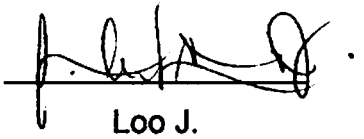
[34] On the application before me, I conclude that Zimmer has not satisfied me that the plaintiffs' medical records are required for the certification application. Zimmer has conducted a review of the medical records of at least 3,100 patients who have had a Durom Cup implant. The medical records of these two plaintiffs will likely add nothing.

[35] As counsel for Zimmer concluded in his argument, it may be that the medical records show that the surgical technique used in connection with both plaintiffs were the same, in which case they will be of little use in arguing against certification.

[36] Accordingly, the application is dismissed.

[DISCUSSION RE COSTS]

[37] The parties may make submissions on costs. You can do it either way: you can either appear before me, or do it in writing, whichever you prefer.



Loo J.