CITATION: McSherry v. Zimmer GMBH, 2014 ONSC 5527
COURT FILE NO.: CV-10-408365-00CP
DATE: 20140924

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
GLORIA McSHERRY	)	*Douglas Lennox*, for the Plaintiff
Plaintiff	)	
– and –	)	
ZIMMER GMBH, ZIMMER, INC., and ZIMMER OF CANADA LIMITED	)	*Peter J. Pliszka*, for the Defendants
Defendants	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: September 24, 2014

PERELL, J.

REASONS FOR DECISION

[1] This is a motion by the Plaintiff Gloria McSherry for certification of this products liability action as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[2] The Defendants, Zimmer GMBH, Zimmer, Inc. and Zimmer of Canada Limited, consent to certification.

[3] For the reasons expressed below, I am satisfied that all the criteria for certification are satisfied. The motion for certification is granted.

[4] This lawsuit is companion litigation to a certified national class action in British Columbia known as *Jones* v. *Zimmer GMBH et al*. See *Jones* v. *Zimmer GMBH et al*., 2011 BCSC 1198; affirmed, 2013 BCCA 21. Both this action, and the *Jones* Action, concern the same allegedly defective medical product: the Zimmer Durom hip implant.

[5] The *Jones* Action commenced in July 2009, and it has been case managed by Mr. Justice Bowden in the British Columbia Supreme Court. Documentary discovery began in 2012 with productions by the Defendants exceeding 132,000 documents. Oral discovery is imminent, and a trial date in British Columbia has been fixed for September 21, 2015, lasting eight weeks.

[6] Apart from a carriage motion (See *McSherry v. Zimmer GMBH*, 2010 ONSC 4113) and a motion for a notice plan associated with the *Jones* Action, Ms. McSherry's action has stood down and the parties have focused their attention on the British Columbia action.

[7] The notice program in the *Jones* Action involved 95 hospitals across Canada mailing a copy of the notice of certification of the British Columbia action to the last known address of patients who had received the Zimmer hip implant. The notice was received by 2433 patients. Of these, 952 patients opted into the *Jones* Action by the December 31, 2013 opt-in deadline.

[8] As effective as the notice program may have been, there are putative Class Members who did not opt into the *Jones* Action and who may not be aware of the class actions against the Defendants. For these Class Members, certification of this action in Ontario would protect their rights and their limitation periods and enhance access to justice. If Ms. McSherry's action is certified, Class Members who missed out on the *Jones* Action will have a procedural vehicle for their claims.

[9] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims or defences of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff or defendant who would adequately represent the interests of the class without conflict of interest and there is a workable litigation plan.

[10] The cause of action criterion is satisfied. Ms. McSherry pleads a products liability claim in negligence.

[11] The class definition criterion is satisfied. The parties have agreed to the following class definition:

> All persons who were implanted with the Durom acetabular hip implant in Canada, excluding residents of British Columbia and Quebec, and those persons who opt into the class certified by the British Columbia Supreme Court in Jones et al. v. Zimmer GMBH et al. (the "Class"), and
>
> All persons who by reason of his or her relationship to a member of the Class are entitled to make claims under any of the Dependants Statutes in Canada as a result of the death or personal injury of such member of the Class (the "Family Class").
>
> Dependants Statutes means the Family Law Act (Ontario), Fatal Accidents Act (Alberta), Tort-Feasors Act (Alberta), Fatal Accidents Act (Saskatchewan), Fatal Accidents Act (Manitoba), Fatal Accidents Act (New Brunswick), Fatal Accidents Act (P.E.I.), Fatal Injuries Act (Nova Scotia), Fatal Accidents Act (Newfoundland), Fatal Accidents Act (Nunavut), Fatal Accidents Act (Northwest Territories), and Fatal Accidents Act (Yukon).

[12] It may be noted that the class definition does not include Quebec Class Members. There was a carriage motion in that province and carriage was granted to the Merchant Law Group on the basis of Quebec's first-to-file rule. (See *Wainberg* c. *Zimmer Inc.*, 2012 QCCS 4276). The Quebec action is not yet certified, and hundreds of Quebec residents have delivered opt-in forms in the *Jones* Action. However, given that Mr. Justice Gouin of the Quebec Superior Court has issued reasons on carriage in the Quebec lawsuit, and for reasons of comity, Ms. McSherry is not seeking to include Quebec residents as Class Members.

[13] The parties propose the following common issues:

(a) Was the Durom acetabular hip implant defective and/or unfit for its intended use?

(b) Did any of the Defendants breach a duty of care owed to Class Members and, if so, to when and how?

(c) Does the Defendants' conduct warrant an award of punitive damages and, if so, to whom shall they be paid and in what amount?

[14] The common issues reflect the issues already approved in the *Jones* Action and are generally consistent with common issues approved in other product liability class actions.

[15] With respect to criterion s. 5(1)(d), preferability, the fact that the Defendants have consented to certification and that the *Jones* Action is already certified and is moving towards trial, is persuasive evidence that certification is the preferable procedure. The *Jones* Action will move forward in any event, and the resolution of the *Jones* Action would then contribute to an efficient resolution of the claims captured by certification of the present action. Conversely, if this action is not certified, then Class Members who missed joining the *Jones* Action may be left without a remedy.

[16] Finally, I am satisfied that the Representative Plaintiff criterion is satisfied. The litigation plan is to continue to focus on the litigation in British Columbia. Regarding notice, it is proposed that notice of certification in this action be limited to publication on the internet and to direct notice to counsel with clients who have already brought individual claims against the Defendants. In the circumstances of this case, I am satisfied with the adequacy of this notice plan.

[17] For the above reasons, I certify this action as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

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Perell, J.

Released: September 24, 2014

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