CITATION: McSherry v. Zimmer GmbH, 2016 ONSC 4606
COURT FILE NO.: CV-10-408365-00CP
DATE: 20160720

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
GLORIA McSHERRY	)	*Douglas Lennox* and *David Klein*, for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
ZIMMER GmbH, ZIMMER, INC., and ZIMMER OF CANADA LIMITED	)	*Peter J. Pliszka*, for the Defendants
	)	
Defendants	)	
	)	
	)	**HEARD**: July 14, 2016

Proceeding under the *Class Proceedings Act, 1992*

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] This is a motion for approval of a settlement in this action that was certified as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. See: *McSherry* v. *Zimmer GMBH*, 2014 ONSC 5527.

[2] The moving parties also seek approval of Class Counsel's fee and an honorarium for Gloria McSherry, who is the Representative Plaintiff, and for Glenn Emond, a Class Member who provided assistance throughout, particularly during the mediation sessions that eventually led to the settlement agreement.

B. FACTUAL BACKGROUND

1. The Class Actions

[3] 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. There are also related proceedings in Québec; see: *Major* c. *Wainberg*, 2016 QCCS 902.

[4] Both this action, and the *Jones* Action, concern the same allegedly defective medical product: the Zimmer Durom Hip Implant.

[5] Klein Lawyers was the first law firm in Canada to file a lawsuit regarding the Zimmer Durom Hip Implant with no other firms filing competing actions until nearly a year and a half later. The *Jones* action brought by Klein Lawyers came before the ultimate recall of this medical device by four months.

[6] The British Columbia plaintiffs, Mr. Jones and Ms. Wilkinson, first contacted Class Counsel; i.e. Klein Lawyers, about their injuries in April and June 2009, respectively. Their action (the *Jones* Action) was commenced in British Columbia on July 24, 2009.

[7] The *Jones* Action was heavily contested. The defendants unsuccessfully appealed the certification order, and the Action proceeded through the discovery stages.

[8] In Ontario, on August 10, 2010, Klein Lawyers filed an action on behalf of Ms. McSherry for a proposed products liability class action for Ontario residents with respect to the Zimmer Durom Hip Implant.

[9] However, in Ontario, on October 27, 2010, with Rochon Genova LLP as lawyer of record, Mr. Mets and Ms. Griffiths commenced a proposed national opt-out class action against Zimmer Holdings Inc., Zimmer, Inc., Zimmer GmbH and Zimmer of Canada Limited.

[10] There was a carriage contest, and in July 2012, I awarded carriage to Ms. McSherry. See: *McSherry* v. *Zimmer GMBH*, 2012 ONSC 4113. By this time, the *Jones* Action had been certified as a national class action. See: *Jones* v. *Zimmer GMBH*, 2011 BCSC 1198.

[11] Pursuant to the notice of certification in the British Columbia proceedings, 95 hospitals across Canada were directed to mail the notice to their patients who had been implanted with the Zimmer Durom Implant. The hospitals identified 3,423 patients to whom the notice was mailed. Courts in Ontario and Quebec assisted in the enforcement of that notice order.

[12] A total of 1,102 opt-in forms were received in the *Jones* Action from Class Members across Canada, and there were 15 opt-out requests from Class Members residing within British Columbia.

[13] With Ms. McSherry's instructions, the focus of her lawyer's attention was on prosecuting the *Jones* Action. However, with the settlement of the British Columbia action, a motion was brought for the certification of the *McSherry* Action for settlement purposes. See: *McSherry v. Zimmer GMBH*, 2014 ONSC 5527.

[14] The *McSherry* Action was certified. The class definition is as follows:

> 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.*; 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.

[15] The certified common issues are as follows:

(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, 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?

[16] In Ontario, after the notice of certification was issued pursuant to a court order dated September 24, 2014, a total of 36 opt-out requests were received before the opt-out deadline of December 17, 2014.

[17] Recently, in *Crider* v. *Nguyen*, 2016 ONSC 4400, I ordered that an Ontario plaintiff could opt-out of the *McSherry* Action past the deadline in order to pursue an individual action.

[18] Notice of certification in the Quebec action was issued pursuant to a court order dated May 6, 2016, with an opt-out deadline of June 23, 2016. There were 17 opt-outs in the Quebec action.

2. The Negotiation of the Settlement Agreement

[19] As already noted above, the litigation was vigorously defended in British Columbia for seven years, but from time to time there were settlement negotiations. There were two mediation sessions that failed, with only the third mediation being successful.

[20] The settlement was negotiated with the assistance of a highly experienced mediator, the Honourable George Adams, who presided at all the mediation sessions.

[21] On November 2015, a settlement agreement was signed by the Defendants and by the Representative Plaintiffs in *McSharry* Action and in the *Jones* Action, as well as by all the provincial health insurers.

3. The Terms of the Settlement Agreement

[22] The essential terms of the settlement are as follows:

- Class Members receive compensation in exchange for a release of their claims.
- In exchange for the release, the Defendants agree to compensate Class Members for revision surgeries irrespective of whether a particular Class Member can prove that their implant failure was due to a product defect.
- To be eligible for compensation as a revised claimant, a Class Member must have undergone revision surgery by September 1, 2015, or have at least scheduled the revision surgery by that date.
- The compensation levels vary with the nature of the individual Class Member's claim. Total compensation for an uncomplicated revision case may reach $97,500 per claimant, inclusive of derivative claims. For a complicated revision case, compensation may reach $172,500 per claimant, inclusive of derivative claims.

- There is an increased base payment of $90,000 for a Class Member who underwent a bilateral revision. As well, Class Members who suffered complications may be eligible for up to $40,000 in additional compensation. As such, the maximum value of an individual claim under the settlement may exceed $172,500.
- The settlement agreement reduces the compensation by $10,000 for Class Members who had the device implanted for more than six years prior to revision surgery, recognizing the added challenges that such Class Members might have in proving that their revision related to a product defect, and was not for some other reason that might have occurred in any event.
- The settlement does not require that the Class Member prove the cause of their implant failure, or that the implant they specifically received was defective, or the cause of their specific injuries. All revisions that occured before the eligibility date, or which were scheduled prior to that date, are eligible for compensation unless the Class Member "underwent a revision surgery for a purpose other than explanting a Durom Cup".
- The settlement has a "claims-made" structure. There is no cap on the Defendants' total liability to Class Members and there is no need for Class Members to wait until all claims are adjudicated. There is no risk that the settlement funds will have to be pro-rated.
- The claims process is meant to be user-friendly. Schedule N of the agreement specifies the documents Class Members must submit to establish a revision prior to the eligibility date. Class Counsel has already obtained such information for over 300 Class Members.
- There are additional payments for derivative claims (up to $6,000), for out-of-pocket expenses incurred by the Class Member (up to $2,500 with receipts, plus potentially additional funds paid from an Extraordinary Expense Fund), for refund of the device cost if purchased by the Class Member (approximately $4,000), and for the subrogated healthcare cost recovery claim ($15,000).
- The settlement also provides compensation of $600 for Class Mmembers who are unrevised and are medically precluded from undergoing revision surgery. It is anticipated to be several thousand Class Members who fall within this compensation category.
- Crawford Class Action Services is to be the Claims Administrator.
- Schedule O of the settlement agreement provides an appeal protocol from decisions of the Claims Administrator. These will be by arbitration. For Class Members outside Quebec, appeals will be to the Honourable Marion J. Allan, and for Class Members resident in Quebec, appeals will be to the Honourable Andre Forget.

[23] Based on Class Counsel's interviews of Class Members and review of medical records, it appears that there may be several hundred Class Members with claims based on revision surgery having been performed or scheduled. The current median age of such Class Members is 61.

[24] Class Counsel recommends the settlement.

[25] Ms. McSherry who helped to negotiate the settlement agreement recommends its approval.

4. Settlement Approval Hearings

[26] On March 7, 2016, in Quebec, Justice Gouin of the Quebec Superior Court removed the Merchant Law Group and its client from the Quebec action, and appointed a new firm, Trudel Johnston & Lesperance, and a new lead plaintiff, Mr. Major.

[27] In April 2016, an addendum to the settlement agreement was signed incorporating the new Quebec plaintiff into the settlement.

[28] On May 6, 2016, the Quebec action was provisionally authorized as a class action for settlement purposes. See: *Major* c. *Wainberg*, 2016 QCCS 902.

[29] Subsequently, the courts of British Columbia, Ontario and Quebec approved orders providing for national notice of hearings to review the proposed settlement.

[30] To date, Class Counsel has received 12 written objections from persons in relation to the *Jones* Action and two written objections from persons in relation to the *McSherry* Action. There were no objectors in the Quebec action.

[31] Of the 12 objections delivered in the *Jones* Action, eight of these were from British Columbia residents, and four were from non-resident Class Members who had signed opt-in forms in the British Columbia proceeding (two from Ontario residents and two from Quebec residents).

[32] Ten objectors objected to the eligibility date. Three objectors felt that the quantum of compensation was inadequate for their particular circumstances. Four objectors complained about delays in the Canadian healthcare system and two objectors expressed a misunderstanding about class action procedure.

[33] The approval hearings in Quebec and British Columbia were held on June 28, 2016. Justice Gouin approved the settlement by reasons issued July 4, 2016: *Major c. Zimmer Inc.*, 2016 QCCS 3093. A decision from Justice Bowden of the British Columbia Supreme Court is pending.

5. Fees and Disbursements

[34] The Representative Plaintiffs, and other Class Members, have each signed retainer agreements with Class Counsel that provide for a one-third (33.33%) contingency fee, plus payment of taxes and disbursements.

[35] In total, 332 Class Members have signed such agreements. These retainers were signed with Class Members who advised Class Counsel that they had suffered a revision, or were medically precluded from undergoing a revision. The retainers were concluded at the same time that these Class Members signed medical records authorizations, permitting Class Counsel to obtain their individual medical records, review these, and submit them to the Defendants as part of the negotiation process.

[36] Klein Lawyers has signed retainer agreements with the provincial health ministries of British Columbia, Alberta, Saskatchewan, Ontario and Quebec. Klein Lawyers will be charging

a fee to these provinces pursuant to those agreements for the work done in recovering the subrogated claims.

[37] To date, Klein Lawyers' disbursements in respect of the litigation are $299,928.41. The firm does not docket its time for class actions.

[38] There is little doubt that the lawyers of the firm expended a great deal of time in prosecuting the action, in negotiating a settlement, and in keeping Class Members apprised of the developments in the litigation including the settlement negotiations.

[39] Pursuant to para. 9.1 of the settlement agreement, the Defendants have agreed to pay $500,000 as a contribution towards Class Counsel fees for all three actions. The Defendants have also agreed to contribute up to $500,000 for disbursements in the three actions.

[40] Class Counsel's proposal is to charge Class Members class as follows:

- For revised Class Members, and for those medically precluded from revision, Class Counsel will charge a ⅓ fee from each of those Class Members.
- For non-revised Class Members who qualify for the $600 payment, Class Counsel does not propose to charge any fees directly from the Class Member. Rather, Class Counsel will treat whatever share it receives of the $500,000 contribution the Defendants are making towards fees in all three provincial actions as payment for work on behalf of the non-revised Class Members.

C. DISCUSSION AND ANALYSIS

1. Settlement Approval

[41] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.) at para. 43; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[42] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra*, at para. 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.) at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra*, at para. 45; *Kidd v. Canada Life Assurance Company*, *supra*.

[43] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed

settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10. An objective and rational assessment of the pros and cons of the settlement is required: *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23.

[44] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation: *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 70; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.). A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally: *Fraser v. Falconbridge Ltd.* (2002), 24 CPC (5th) 396 at para. 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 (Ont. S.C.J.) at para. 17.

[45] The design of the approval process requires the court to carefully scrutinize any proposed settlement. The design of the approval process: (a) requires the proponents of the settlement to justify it; (b) provides an opportunity for those affected by the settlement to be heard; and (c) requires the court to evaluate the settlement and make a formal order. This design is meant both to deter bad settlements and also to ensure good ones that achieve the goals of the class action regime; namely: access to justice, behaviour modification, and judicial economy.

[46] The most serious objector criticism of the settlement was a provision that set a deadline for the revision surgery having occurred or having been scheduled. If a Class Member missed the deadline then he or she would not qualify for any substantial compensation under the settlement. In this regard, it should be recalled that the settlement provides compensation of only $600 for Class Members who are unrevised and only this level of compensation is available for a Class Member who had revision surgery scheduled after the deadline specified in the settlement agreement.

[47] I am persuaded, however, that the precondition to substantial compensation under the settlement agreement is fair and reasonable. Medical devices are not perfect and may fail for reasons other than negligent manufacture. Setting a deadline by reference to whether or not the patient had or scheduled revision surgery is reasonable and reflects the increased difficulty a Class Member would have in proving causation with the passage of time after the medical device has been implanted.

[48] In my opinion, having regard to the various factors used to determine whether to approve a settlement, the settlement agreement should be approved.

[49] Class Counsel achieved a good result. The case proceeded through contested certification, an appeal, discoveries and three mediations towards a comprehensive settlement.

The compensation available under the settlement, while a compromise, compares reasonably well with the range of damages that might be obtainable at trial. The claims-based uncapped liability of the Defendants is a very favourable feature of the settlement.

[50] I conclude that the settlement is fair, reasonable, and the best interests of the Class Members.

2. Class Counsel Fee

[51] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.) at para. 13; *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.) at para. 25.

[52] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Smith v. National Money Mart, supra*; *Fischer v. I.G. Investment Management Ltd., supra*, at para. 28.

[53] In my opinion, having regard to the various factors used to determine whether to approve the fees of class counsel, the fee request in the immediate case should be approved.

3. Honorarium

[54] This is an appropriate case for the requested honorarium. Put simply, Ms. McSherry and Mr. Emond were engaged, energetic, diligent, and committed and made a significant contribution to bringing the class actions to a conclusion that was in the best interests of the Class.

D. CONCLUSION

[55] For the above reasons, I approve the settlement, and I approve Class Counsel's fee request and the honorarium.

Perell, J.

Released: July 20, 2016

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