

CANADA / JUDGMENT

Hoisington v. Johnson & Johnson Inc.

2020 BCSC 1018

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1018 Hoisington v. Johnson & Johnson Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hoisington v. Johnson & Johnson Inc.,

2020 BCSC 1018

Date: 20200708

Docket: S088553

Registry: Vancouver

Between:

Deborah Hoisington and

Stefanie Puls

Plaintiffs

And

Johnson & Johnson Inc., Janssen-Ortho Inc.,

now named Janssen Inc., Canderm Pharma Inc.,

Colbar Lifescience Ltd., ABC2 Company, ABC3 Company,

Anna Maria Duchon John Doe1, John Doe2, Jane Doe

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiffs, attending by telephone:

E. Stanger

Counsel for the Defendants,

Canderm Pharma Inc. and Anna Maria Duchon, attending by telephone:

M. Sharp

Class Member and Objector, attending by telephone:

B. Chute

Place and Date of Hearing:

Vancouver, B.C.

June 25, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 8, 2020

- [1] In Reasons for Judgment dated March 24, 2020 and indexed at 2020 BCSC 431 (the "Discontinuance Reasons"), I approved the application of the proposed representative plaintiffs, Ms. Hoisington and Ms. Puls (the "Plaintiffs"), to certify and discontinue the within action as against the Defendants, Canderm Pharma Inc. and Anna Maria Duchon (the "Canderm Defendants"). That discontinuance was to take effect 30 days after notice was given to class members, provided that there were no opt outs or objections. Notice to the class was provided on April 23, 2020. While there were no opt outs, there was one objection filed by Ms. Barbara Chute.
- [2] A subsequent telephone conference was scheduled with counsel for the Plaintiffs, and the Canderm Defendants and with Ms. Chute. The reasons that follow address the various concerns and issues that were raised by Ms. Chute in relation to the discontinuance of the action.

Background and History

- [3] Before turning to the specific positions of the parties and of Ms. Chute, some understanding of the history and underlying basis of this action is important. In the Discontinuance Reasons I provided the following description and chronology:

A. The Basis for this Action

- [4] In or about December 2006, the Plaintiffs were injected in the lips with a product known as Evolence. As a result of those injections they allege that they experienced permanent lip disfigurement in the form of, inter alia, nodules, lip colour changes, unusual swelling, chafing and chapping in the lips, and increased sensitivity to cosmetics causing redness and inflammation. This Court has previously been provided with evidence of other potential class members who suffered similar difficulties following injections with Evolence.
- [5] The Plaintiffs made, inter alia, the following allegations in the Notice of Civil Claim that was filed on their behalf:
- a) The product Evolence was developed by the Defendant Colbar LifeScience Ltd. ("Colbar") as a cosmetic filler for use in cosmetic surgery.
 - b) Prior to the year 2000, the United States company Johnson & Johnson Inc. ("J&J US") purchased Colbar to obtain access to various cosmetic filler products that had been developed by Colbar.
 - c) J&J US then began to market and sell the Evolence products to plastic surgeons in the United States as a cosmetic filler for repair of deep facial lines.
 - d) The Defendant Johnson & Johnson Inc. in Canada ("J&J Inc.") is a wholly-owned subsidiary of J&J US. J&J Inc. applied for and received authorization from Health Canada to use the product Evolence as a cosmetic filler for repair of deep facial lines.
 - e) J&J Inc. and its subsidiaries, the Defendant Janssen Inc. and Colbar (collectively the "J&J Defendants") then began to market, sell and/or license Evolence for use as a cosmetic filler.
 - f) The J&J Defendants entered into a contractual relationship with Canderm to allow Canderm to be the exclusive marketer and sales organization for the sale of the product Evolence as a cosmetic filler.
 - g) Canderm used its contacts in the cosmetic and cosmeceutical industry to market and obtain orders from cosmetic surgeons for Evolence. The Defendant, Ms. Duchon, was an employee of Canderm and its Western Canada Representative for sales and distribution of Canderm products.
 - h) In or around 2004, the Canderm Defendants began to advise physicians and other users that Evolence could be injected and used to augment lips.
 - i) The J&J Defendants and Canderm, either together or individually, knew or ought to have known that the product Evolence had not been tested for use as an injected lip augmentation filler. Furthermore, the J&J Defendants and Canderm, either together or individually, knew or ought to have known that, for various reasons, the use of Evolence for purposes other than the filling of deep lines, and in particular in the lips, could cause disfigurement, pain, irritation, and swelling.

- j) Notwithstanding that knowledge, the J&J Defendants and the Canderm Defendants, either together or individually, advised cosmetic surgeons throughout Canada that Evolence could be used safely for lip augmentation by injection. As a result of that advice cosmetic surgeons in Canada began to order Evolence from the Canderm Defendants for the purposes of injection and lip augmentation.
- [6] The Plaintiffs' claim is advanced in negligence, as a breach of contract, in unjust enrichment, and as a breach of each of the Sale of Goods Act, R.S.B.C. 1996, c. 410 and the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2. A separate plaintiff began a separate companion action in the Ontario courts in *Micevic v. Johnson & Johnson et al* under file no. CV-09-390846-00 (the "Ontario Action"). Counsel in both jurisdictions formed a consortium after issuance of the claims and agreed that the Ontario Action would be stayed and that the proposed class action would be pursued in British Columbia rather than in both jurisdictions.

B. The History of this Action

- [7] A Writ of Summons was filed in this action in December 2008. The original Notice of Civil Claim was filed in December 2010. The original Statement of Claim in the Ontario Action was filed in November 2009.
- [8] The Plaintiffs served their materials for a certification application in December 2012. I was appointed to case manage the action in February 2013. Prior to a contested certification hearing, the Plaintiffs reached a class wide settlement, in principle, with both the J&J Defendants and the Canderm Defendants. Over the ensuing months, however, the parties continued to be at odds over various procedural issues that pertained primarily to the implementation of the settlement.
- [9] In July 2015, the Plaintiffs brought an unsuccessful application to enforce what they believed was a settlement agreement they had made with the Canderm Defendants. The reasons for judgment arising from that application are indexed at 2015 BCSC 1582 (the "Settlement Agreement Reasons"). The following parts of the Settlement Agreement Reasons are relevant:
- [5] It is common ground that the size of the proposed class is expected to be limited, possibly to no more than 50 individuals, and that the global amounts involved in the action are likely to be correspondingly modest. It is also clear that all parties have worked diligently to settle the action. The central impediment to any such settlement has been the procedure by which the action would be certified, members of the class would be given notice of the settlement, and the settlement would then be approved.

- [63] Counsel for the plaintiffs' written submissions assert that at the March 31, 2015, hearing I "admonished" counsel to resolve the procedural issues associated with the action. Though the word "encouraged" rather than "admonished" might be preferable, this is generally accurate.
- [64] This is an action involving relatively modest sums, involving able and knowledgeable counsel, where the only apparent matter in dispute is the best means by which to bring about the certification/notice/settlement/dismissal of the action before the British Columbia and Ontario courts. Nevertheless, it is not for this Court, in the absence of any formal application, to impose a particular procedure or regime on the parties.
- [10] An application for certification of the class proceeding, for the purposes of effecting a settlement agreement with the J&J Defendants (the "J&J Settlement"), was brought in a hearing dated January 22 and 29, 2016. The Canderm Defendants opposed aspects of the proposed certification order and notice plan. Once again, the primary issues that they raised were procedural in nature. I delivered reasons for judgment, indexed at 2016 BCSC 807, in respect of that application (the "Certification Reasons"). In the Certification Reasons I repeated what I had earlier said at para. 64 from the Settlement Agreement Reasons and I then continued:
- [59] These comments continue to be relevant. Though various issues of procedure continue to be a source of disagreement between the parties, no application has been or is advanced by the Canderm Defendants to resolve these issues. There is then, at this point, nothing before me to address, or consider, or determine.
- [60] This action is now eight years old. Its progress to the courts has been glacial. It is said to involve a very small class and modest sums of money. As K. Smith J.A. said: "simplicity and expedition have been elusive goals in the management of this case"; Halvorson at para. 1.
- [73] Often the objects of timeliness, consistency, and efficiency do not align perfectly. In this case, the procedures that have been proposed reasonably reflect the needs of the present litigation and reasonably advance the objects of consistency and timeliness. To the extent there is a suggestion that there may be more efficient procedures available, and I do not say that that is so, such suggestions ring hollow after several years in which the same issue has been raised repeatedly in multiple hearings and in multiple conferences without the matter being advanced in any meaningful, or substantive or formal way. Furthermore that finite object is necessarily overtaken at a certain point when other objects, such as timeliness and the fair resolution of the dispute, are being held hostage to questions of process.
- [11] The Canderm Defendants then applied for various cost orders in a hearing dated July 7 and September 16, 2016. It was that application that gave rise to the Costs Judgment. In the Costs Judgment, at paras. 102 and 103, I once again referenced the concern that "this is a comparatively modest class action involving perhaps 30 - 50 plaintiffs", that the issues being argued about were overwhelmingly procedural in nature and that based on what I had been told I expected that the parties had "cumulatively, if not individually, spent more than is

being claimed in the action".

- [12] The foregoing chronology does not address the myriad other conferences or applications, including applications that were brought and then adjourned. It also does not address the myriad applications that were brought in Ontario, primarily in connection with the J&J Settlement.
- [13] Ultimately, during the J&J Settlement notification process, 13 plaintiffs, nationwide, advanced claims. There were no opt outs but there was one objection that was subsequently addressed.
- [14] At present, this action is more than a decade old. The likely class has been fixed with reasonable precision. The Canderm Defendants have filed materials, which I will return to in a different context, indicating that they have incurred in excess of \$800,000 in legal fees, costs and taxes. This is multiples of what the class received from the J&J Settlement. The inclusion of the likely legal fees of the Plaintiffs and of the J&J Defendants would dwarf the benefits achieved by the class.
- [4] I believe that the foregoing chronology captures aspects of the difficulties that were associated with this action as well as how hard-fought the litigation itself has been. This latter point bears emphasis. The focus of the various applications I heard were primarily procedural in nature. Nevertheless, the materials and expert reports that were filed before me revealed, at an early date, that the Plaintiffs might encounter significant difficulty in establishing that the lumps and nodules experienced by the Plaintiffs and putative class members were caused by Evolence as opposed to other potential causes identified by the various Defendants' experts.
- [5] In addition, the J&J Settlement was intended to settle all claims brought against the J&J Defendants on behalf of all persons in Canada who received an injection of Evolence. This included any claims for vicarious liability that arose from the actions of the Canderm Defendants.
- [6] Accordingly, the J&J Settlement contained a bar order preventing the Canderm Defendants from cross-claiming against the J&J Defendants and restricting the Plaintiffs' claim against the Canderm Defendants to its several liability. Thus, the Plaintiffs would, in any ongoing action, only be entitled to claim "those damages proven to have been caused solely by each of the Canderm Defendants".
- [7] There is another aspect of the foregoing chronology that requires further development. Ms. Chute, as was her right, also objected to the earlier J&J Settlement. She was the only one to do so. It is apparent from the various endorsements that were issued by the Ontario Court in the companion action *Micevic v. Johnson & Johnson*, CV-09-390846-00CP, that Ms. Chute took the position that the proposed settlement with the J&J Defendants did not adequately compensate class members, like herself, who claimed lost income as a result of the injection of Evolence. It is common ground that Ms. Chute's objections were taken into account by

Justice Morgan when His Honour approved the J&J Settlement with an adjustment to increase the maximum "income loss" available to class members from \$5,000 to \$20,000. This adjustment was expressly made in recognition of Ms. Chute's claimed income loss.

Positions of the Parties and of Ms. Chute

- [8] Ms. Chute advanced various positions in her written material and in her oral submissions, which can be succinctly summarized. Ms. Chute particularly emphasized various studies and other materials, including different pieces of legislation, in support of the position that the Plaintiffs, as a class, had a strong claim against the Canderm Defendants. She also explained that the injuries she suffered as a result of the injection of Evolence, and the emotional and other consequences of those injuries, appear to be greater in her case than for the other members of the class. Finally, she sought to address the lengthy passage of time since the claim had been commenced, the small size of the class, and the comparatively modest amounts that were involved in the Plaintiffs' claims, each of which, individually and collectively, militated in favor of the discontinuance that the Plaintiffs and the Canderm Defendants had agreed to.
- [9] The positions of counsel for the Plaintiffs and the Canderm Defendants overlapped to a significant degree. Both emphasized the various factors that anchored and supported the original Discontinuance Reasons. Both referred to numerous authorities that establish the relevant legal framework and, in particular, that emphasize that the Court's obligation in such circumstances is to consider the best interests of the class as a whole and not the interests of individual class members. Still further, counsel for the Plaintiffs emphasized that the Plaintiffs wished to move on with their lives and that they had no ongoing interest in pursuing the litigation. In addition, he explained the various legal obstacles that he considered the Plaintiffs faced and his measured assessment of the difficulties the Plaintiffs would have in overcoming those hurdles as against the Canderm Defendants.

Analysis

- [10] One of the issues relied on by counsel for both the Plaintiffs and the Canderm Defendants is the fact that parts of the written materials Ms. Chute filed in the Ontario J&J Settlement proceedings, as well as aspects of the written reasons of Justice Morgan, suggest that Ms. Chute had represented that her losses had been fully accounted for by the J&J Settlement. Before me, Ms. Chute emphasized that her earlier comments had been directed to, and were limited to, the adequacy of the J&J Settlement. They were not, she explained, intended to extend to any claim against the Canderm Defendants. For present purposes I accept her submissions and position.
- [11] Ms. Chute's objections, though entitled to serious consideration, face various other practical and legal obstacles. The practical considerations that pertain are significant. This is an action with an extended history and with a very small class whose members, with the exception of Ms. Chute, have no apparent ongoing interest in the litigation. The action

involves comparatively small amounts of money, it faces significant legal obstacles and the legal fees that have been incurred and that would still have to be incurred, dwarf the amounts in issue: Discontinuance Reasons at para. 14. It is noteworthy that Ms. Chute does not wish to opt out from the proposed discontinuance. Rather, she seeks to have the action continued on behalf of the class. It is also relevant that her remaining claim, after receipt of the J&J Settlement monies, is for approximately \$8,000. These latter considerations engage issues of proportionality and judicial economy: Discontinuance Reasons at paras. 30 and 31.

- [12] The principles that emerge from the relevant authorities are also, for the most part, inconsistent with the position that Ms. Chute seeks to advance. Though these authorities overwhelmingly arise in the context of the Court approving a settlement, I am nevertheless of the view that similar considerations pertain in the circumstances of this case. To be specific, my obligation is to determine whether, in all of the circumstances, the intended discontinuance of this action is fair, reasonable, in the best interests of the class as a whole, and not whether it is in the best interests of an individual class member.
- [13] In *Stanway v. Wyeth Canada Inc.*, 2015 BCSC 983, Justice Gropper, in approving a settlement involving a pharmaceutical product that was alleged to cause cancer when taken in combination with other drugs, noted that one of the factors to consider was the "number of objectors and the nature of the objections": at para. 43. She further said:
- [45] While the stories of individuals and their families who have suffered from breast cancer are compelling, as a matter of law I must decide whether the proposed settlement agreement is fair and reasonable and in the best interests of the class as a whole, not whether it is the best possible settlement for an individual class member.
- [14] In *Watt v. Health Sciences Association of British Columbia*, 2020 BCSC 280, Justice Punnett was asked to approve a settlement of a class action where he noted that there were three objectors out of 210 class members. While the Court accepted that these objections were deserving of consideration it considered, given their nature and number, that they did not provide sufficient reason not to approve the settlement. The Court also, at para. 20, cited *Wilson v. Depuy International Ltd.*, 2018 BCSC 1192, for the principle that its obligation is to consider "the best interests of the class as a whole" and that "the court is required to consider the collective interest when reviewing a settlement": *Wilson* at para. 58. Still further, Punnett J., at para. 20, cited various pertinent considerations from *Wilson* including "the likelihood of recovery, or the likelihood of success", "recommendations and experience of counsel", "future expense and likely duration of litigation", and "number of objectors and nature of objections".
- [15] In *McLean v. Canada*, 2019 FC 1075, affirmed on appeal at 2019 FCA 309, the Court similarly said:

- [122] Some objectors felt strongly about their position - some may have been willing to take the risk of a failed settlement. That is their right but they cannot impose their will on the Class. They have the right to opt out and take their own risks, but they cannot impose that risk on the Class as a whole if the Settlement is otherwise fair, reasonable and in the best interests of the Class.
- [16] The various factors and considerations I have identified, individually and collectively, support the discontinuance that I ordered and that counsel for the parties agreed to. As stated above, Ms. Chute is the only objector. The Plaintiffs have no interest in continuing this longstanding litigation. The amount of Ms. Chute's remaining claim is dwarfed by the potential legal costs in continuing the action. Even if the action were to be continued, the Plaintiffs face significant hurdles in establishing their claim. I am satisfied that the discontinuance is fair, reasonable, and in the best interests of the class as a whole.

Conclusions

- [17] Accordingly, notwithstanding Ms. Chute's submissions and sympathetic position, I confirm the earlier Certification and Discontinuance Orders that I made. Leave is granted to the Plaintiffs to file a Notice of Discontinuance, with the terms contained in the March 24, 2020 Order, on behalf of the class.

"Voith J."

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