Date: 19990804
Docket: C954740
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BONITA JEAN SAWATZKY

PLAINTIFF

AND:

**SOCIETE CHIRURGICALE INSTRUMENTARIUM INC.,
INSTRUMENTARIUM SURGICAL CORP. INC.,
177046 CANADA INC.,
GESTION MICHELLE LAFERRIERE INC.,
1041402 ONTARIO INC. and
LA CORPORATION INSTRUMENTARIUM INC.
INSTRUMENTARIUM CORP. INC.**

DEFENDANT

AND:

**DR. RICHARD GREENWOOD
(also known as Dr. Richard Edward Greenwood),
E. WAYNE TUNIS PROFESSIONAL CORPORATION
(also known as E.W. Tunis Professional Corporation),
DR. DONALD I. WAKEHAM,
CALGARY REGIONAL HEALTH AUTHORITY operating as
The Colonel Belcher Hospital,
THE COLONEL BELCHER HOSPITAL,
THE HEALTH SCIENCES CENTRE (also known
as the University of Manitoba Health Science Centre),
UNIVERSITY HOSPITALS BOARD,
UNIVERSITY HOSPITALS BOARD operating as
University of Alberta Hospital
UNIVERSITY OF ALBERTA HOSPITAL,
CAPITAL HEALTH AUTHORITY
(successor to University Hospitals Board),
GOVERNORS OF THE UNIVERSITY OF ALBERTA HOSPITAL,** and
DOW CORNING CANADA INC.

THIRD PARTIES

Brought under the Class Proceedings Act, R.S.B.C. 1996

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BRENNER

Counsel for the Plaintiff:	D. Klein, C. Docken
Counsel for the Defendant, Instrumentarium:	P. Walker, A. Stone
Counsel for the Third Parties, Dr. Tunis, E. Wayne Tunis Professional Corporation, and Dr. Wakeham:	L. Jackie
Counsel for Third Party, Dow Corning:	D. Mullan
Place and Date of Hearing:	Vancouver, B.C. July 15, 1999

[1] On July 15, 1999 I heard an application for court approval of a settlement agreement in the within class action. I also heard an application by the defendant, Instrumentarium, for a Bar Order against the third parties with the exception of Dr. Greenwood, which was a term of Instrumentarium's agreeing to the settlement. These applications were not opposed. At the conclusion of the submissions I approved the settlement agreement and issued the bar order with written reasons to follow. These are those reasons.

BACKGROUND

[2] Instrumentarium was the Canadian distributor of a medical device known as the Vitek Temporomandibular Joint Implant ("TMJ Implant"). Instrumentarium sold the implants in Canada. The contention of the plaintiff is that the implants were defective. Components of the implants broke down in the jaw, resulting in foreign body reactions. These reactions in turn caused deterioration and erosion of the jaw. Unfortunately even after the implants are removed, the foreign body reactions and resulting deterioration of the jaw continues because the teflon material from the implants remains imbedded in the surrounding tissues. Implant recipients require reconstructive surgery to repair the damage; some will have to undergo periodic surgeries for the rest of their lives.

[3] The plaintiff contends that the implants never received the appropriate regulatory approval in Canada.

THE LITIGATION

[4] This action was filed August 23, 1995. The Statement of Claim was amended on April 16, 1996 to include Instrumentarium as a defendant. The plaintiff alleges negligence and misrepresentation by the defendants.

[5] On September 9, 1996 I certified this as a class proceeding against Instrumentarium. The plaintiff, Sawatsky, was appointed as the representative plaintiff.

[6] About seventy British Columbia resident class members have been identified.

[7] Similar actions were filed and certified in Ontario and Quebec. Counsel advise that there are approximately three hundred class members in the three Canadian class actions.

SETTLEMENT NEGOTIATIONS

[8] The only defendant in this action that was involved in the sale or distribution of the Vitek TMJ Implants is Instrumentarium. It ceased operations on October 31, 1994 and has no assets. The Guardian Insurance Company of Canada provided product liability insurance to Instrumentarium from January 21, 1986 until October 31, 1994 in an amount which totals $7.5 Million. Instrumentarium has no other form of applicable insurance coverage. The Guardian Policy represents the only asset of the company.

[9] The defendants have denied the allegations of negligence and misrepresentation. At trial the defendants would raise a number of defences including:

(a) expiration of limitation periods;

(b) lack of causation;

(c) no negligence on the part of the defendants; and

(d) no misrepresentations on the part of the defendants.

[10] As set out in the Affidavit of Candace Wall sworn July 6, 1999 the settlement negotiations were guided by an analysis of the facts and law applicable to the claim of the British Columbia Class. The factors considered included the expense of litigation and the risks and uncertainties associated with protracted trials and appeals in an area of the law dependent upon highly technical scientific and medical expertise. An additional factor was the increased stress for class members who have already waited some four years for a resolution of the litigation.

[11] The negotiations were conducted by plaintiffs' counsel with experience in class proceedings.

THE SETTLEMENT AGREEMENT

[12] A memorandum of understanding was signed by class counsel and counsel for the defendants in October, 1998 setting out preliminary terms of a settlement agreement. Instrumentarium

through its insurer, the Guardian, deposited $9,385,000 into an interest bearing trust account on October 30, 1998. These funds represent the full amount of Instrumentarium's product liability insurance plus pre-settlement interest, costs of administration and disbursements. The parties estimate that this lump sum will increase to approximately $10 Million by the time it can be paid out to the claimants.

[13] The settlement agreement was signed by class counsel and counsel for the defendants in June, 1999. The settlement is subject to the approval of the courts in British Columbia, Ontario and Quebec. The following is a summary of the terms of the settlement agreement:

(a) Class members will be paid from a settlement fund which will initially consist of $8,385,000 plus accrued interest. There will be a reserve fund of $1,000,000 plus accrued interest. The reserve fund will provide payments to individuals who would otherwise be eligible to make claims under the settlement agreement but who continue to assert claims against Instrumentarium. Subject to claim payouts the reserve fund will be maintained for three years at which time $500,000 plus interest will be transferred to the settlement fund for distribution to class members. After an additional three years any remaining funds will be transferred to the settlement fund for distribution to class members;

(b) Class members' claims will be paid from the settlement fund on the basis of a point system based on the number of implants, age at implantation, degree of bone resorption and degree of granuloma formation. Individual claim amounts will depend on the total number of claims and severity of injury suffered by each claimant;

(c) The settlement agreement utilizes a point system which is almost identical to one that was used in the settlement agreement in ***Backstrom v. The Methodist Hospital*** (the "Methodist Settlement") which is a

similar class proceeding that was filed in Texas. Many Canadians were registered as class members in the Methodist Settlement;

(d) Claimants will be required to produce appropriate product identification and proof of injuries. Class members whose claims were accepted in the Methodist Settlement will not be required to resubmit documentation unless they wish to claim at a higher point level;

(e) Individual claim awards will depend on the number of class members and the severity of their injuries;

(f) Claims will be administered by a court appointed claims administrator whose fees will be paid out of the settlement fund. The Ontario Court will review the claims administrator's fees from time to time; and

(g) Claimants will be able to appeal decisions of the claims administrator by filing a Notice of Appeal with the British Columbia, Ontario or Quebec courts. The decision of the court will then be final.

ADVANTAGES OF THE SETTLEMENT

[14] Counsel say that for the following reasons, this settlement is preferable to continued litigation:

(a) Class members will receive compensation without the burden or the litigation risk of having to prove that the TMJ implant caused their injury;

(b) No class member will be ineligible to receive compensation because of expiry of a limitation or prescription period;

(c) Class members will not have to appear in court and will have their confidentiality protected;

(d) Class members will likely receive compensation more quickly than if they were to pursue litigation; and

(e) Class members will not have to face the uncertainty of collection on a judgment from defendants who have limited insurance and no assets. Any race to judgment by individual plaintiffs due to limited resources will thereby be avoided.

[15] A significant factor is that this settlement exhausts Instrumentarium's product liability insurance. Since it has no other insurance or assets, there is arguably little point in pursuing the matter through trial. In effect, the settlement agreement attempts to distribute the insurance that is available on principles that are consistent with tort theories to all class members in an efficient and equitable manner.

[16] Many Canadians were registered as class members in the Methodist Settlement. The point system and proof of claim requirements in that court approved settlement are almost identical to this settlement. As such, many class members will not be required to resubmit documentation for product identification and proof of injuries which will expedite the claims process.

[17] The settlement agreement is supported by the representative plaintiff Bonita Jean Sawatsky. It was negotiated by senior counsel in three jurisdictions who have extensive experience in class actions. The plaintiff's counsel in each of the Canadian class actions consider the settlement agreement to be fair and in the best interests of the class.

[18] The settlement agreement compares favourably with the Methodist Settlement in which the defendants paid $30 Million to settle the claims of approximately 4,000 class members.

THE LAW

[19] Settlement of the class proceeding must be approved by the court. For approval the settlement must be fair, reasonable and in the best interests of those affected by it. The court is concerned with the interests of the class as a whole rather than the demands of a particular class member.

> ***Haney Iron Works Ltd. v. Manulife Financial*** (December 16, 1998) Vancouver C954749 para. 27 B.C.S.C.;
>
> ***Dabbs v. Sun Life*** (February 24, 1998) Ontario Court of Justice 96-CT-022862 (Gen. Div.), para. 14

[20] The courts power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement. It may only approve or disapprove the settlement.

> ***Haney*** para 22;
>
> ***Dabbs*** para 10; and
>
> ***Harrington v. Dow Corning Corporation*** (February 16, 1999), Vancouver C954330 (B.C.S.C.), para. 7

[21] A settlement must fall within a zone or range of reasonableness. The range of reasonableness has been described as follows:

> All settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interest of those affected by it when compared to the alternative of the risks and costs of litigation.
>
> ***Dabbs v. Sun Life*** (1998), 40 O.R. (3d), 430 at 400 (Gen. Div.)

See also ***Haney*** para. 25.

[22] In making its decision on the reasonableness of a settlement, the court must consider the litigation risk to the plaintiffs (***Haney*** para. 16; ***Dabbs*** pg. 400)

DISPOSITION RE. SETTLEMENT AGREEMENT

[23] In my view the proposed settlement agreement is fair and reasonable to all members of the class. It has been approved by the representative plaintiff and senior counsel. I consider it unlikely that the class members would receive more compensation if they were to pursue litigation and hence in my view the settlement is clearly in the best interests of the class.

THE BAR ORDER APPLICATION

[24] Under the terms of the settlement agreement the class members who share in the limited funds in the settlement proceeds agree to release Instrumentarium and its insurer, the Guardian. However, those class members specifically reserve their rights against all others, although such other persons are to be credited for the amount received by each claimant.

[25] The relevant portion of the release is found in clauses 17.1 and 17.2 of the settlement agreement. Clause 17.2 states:

> Except as otherwise provided herein, nothing in the Settlement Agreement shall prejudice or in any way interfere with the rights of the Settlement Class

> Members to pursue all of their other rights and remedies against persons and/or entities other than the Defendant and Released Parties [as defined in section 1(r) to include Instrumentarium, its related companies and its insurer]. Nevertheless, Settlement Class Members further agree that in the event the Settlement Class Member commences or continues litigation or pursues a claim or makes a claim against any person or entity arising from, arising out of, or connected directly or indirectly with the distribution and insertion of a Vitek Proplast TMJ implant, including all claims for non-pecuniary, punitive, aggravated, and consequential damages, then the Settlement Class Member expressly agrees not to include in respect of any such claim any right to recover from such person or entity any such amounts as have been paid under the terms of this Settlement Agreement to the Settlement Class Member or Settlement Class Members.

[26] The parties recognize that this wording does not protect Instrumentarium from claims for contribution and indemnity including independent claims for indemnity. Accordingly by clause 22.1.2 of the settlement agreement, they provided that the waiver of such claims or the issuance of a bar order would be condition of the settlement agreement.

[27] This clause recognizes that a significant obstacle for Instrumentarium in concluding the settlement is its ability, in exchange for the payment being made, to put an end to all outstanding claims for contribution and indemnity brought against it in several provinces, as well as to prevent such claims being brought against it by parties in existing litigation. Specifically its concern and the concern of its insurer, the Guardian, is that despite having paid out the policy limits in the within action, either or both might be

joined as a party to other extant or future actions by persons or parties who are defendants or third parties in existing litigation in Canada. In addition to the class proceedings in British Columbia, Ontario and Quebec, a number of individual actions have been commenced in the Provinces of Ontario, Manitoba, and Alberta in which Instrumentarium has been named as either a Defendant, or Third Party, or in which they may be so named. Since Quebec is a direct action jurisdiction, the concern of the Guardian is a very real one.

THIRD PARTIES

[28] Prior to filing the third party notices, Instrumentarium had obtained agreements for waivers of all claims (present and potential) for contribution and indemnity and claims for indemnity based on an alleged independent duty from all of the existing defendants and third parties in other actions in which Instrumentarium was a party, with the exception of those that are third partied in the within action. They were added by reason of Instrumentarium's failure to obtain such an agreement. As a result of further negotiations the named third parties have now agreed not to oppose this application. Instrumentarium has made arrangements with the third party, Dr. Greenwood, and does not seek a bar order against him.

BAR ORDER

[29] The purpose of the bar order sought is to cap the defendant's risk of settlement by ensuring that neither it nor

its insurer will be subject to any further liability with respect to the underlying and related litigation. The order would bar the rights of the third parties to pursue claims over against Instrumentarium insofar as they relate to the claims of class members of the British Columbia class regardless of residency.

[30] Bar orders have their origin in the United States and have been frequently been used to achieve settlement of complex tort and securities litigation including class action law suits. They came about in order to counteract the inhibiting effect of claims for contribution on settlements.

[31] In a recent Ontario class proceeding ***Ontario New Home Warranty v. Chevron Chemical Company et al*** (Ontario Superior Court of Justice, unreported, 1999, court file no. 22487/96) the settling defendants and class members sought a Bar Order as against the non-settling defendants. While Winkler, J. stated (at page 7) that he was unable to accept the American authorities as being dispositive of the issue, he went on to say:

> I do, however, find that the underlying principles on which "bar orders" are granted in the American cases have some application to these proceedings. Moreover, the ***Class Proceedings Act*** provides a specific mechanism through which these objectives can be achieved in class proceedings in Ontario. Under s. 13 the Court may "stay any proceeding relating to the class proceeding before it, on such terms as it considers appropriate." This broad discretion is buttressed by s.12 which permits the court, on a

> motion by a party or class member, to make such orders as are necessary to ensure the fair and expeditious determination of the class proceeding.

[32] Section 12 of the ***Ontario Class Proceedings Act***, 1992, S.O. 1992, c. 6 (the "Ontario Act") provides:

> The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[33] Section 13 provides:

> The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

[34] In discussing the role of these two provisions, Winkler J. stated at page 7:

> By including ss. 12 and 13 in the ***Act***, the Legislature has given the Court a flexible tool for adapting procedures on a case specific basis. As stated in the ***Report of the Attorney General's Advisory Committee on Class Action Reform*** at 37:
>
> > [These sections describe] the general power of the court to control its own process and to develop procedures as needed from case to case.
>
> In view of the fact that it is apparent that a court has the statutory discretion to issue the order asked for, on appropriate terms, I turn to the objections raised by the non-settling defendants...

[35]***New Home Warranty*** was a class action products liability claim brought by the Ontario New Home Warranty Program

("ONHWP") and two individuals as representative plaintiffs concerning allegedly defective gas or propane furnaces, boilers and hot water heaters with High Temperature Plastic Vent ("HTPV") exhaust systems. In that action, three of the defendant companies wished to settle, although the defendant furnace manufacturers did not.

[36] Following mediation, the plaintiffs and settling defendants agreed that the settling defendants proportionate share of liability was 65% of the repair cost figure plus costs. The plaintiffs moved to have this portion of the settlement approved at once, and the class proceedings certified against the settling defendants so that the plaintiffs could take advantage of the payment. The plaintiffs intended to bring a subsequent motion for certification against the non-settling defendants for litigation purposes. The settling defendants agreed, so long as the judgment approved the entire settlement agreement, including the provision preventing the non-settling defendants from making any further claims for contribution and indemnity against the settling defendants for any damages awarded to the plaintiffs at trial. The non-settling defendants sought to preserve this right by opposing this provision of the settlement agreement.

[37] Winkler J. approved the settlement and granted the bar. He described the ***Ontario Act*** as ***sui generis*** legislation, that not only envisioned the balancing of interest between the

parties to litigation, but that also provided the court with the "necessary power to adapt procedures" to adequately protect the interest of all parties. At p. 12 he stated:

> [73] The ***Class Proceedings Act*** is meant to provide a mechanism for the redress of mass wrongs which are linked by an element of commonality. This is such a case. The court must remain flexible and exercise its inherent jurisdiction to meet the needs of the parties and to achieve the purpose of the statute.
>
> [74] The settlement before this court meets the underlying objective of the ***Act***. There is no objection to its terms, save for the prohibitive provisions. However, if these provisions are not approved the entire settlement will fail. This will seriously prejudice the plaintiff class in terms of delay and costs of litigation and further, expose the plaintiffs to the risks of litigation. Conversely, to ignore the procedural concerns advanced by the non-settling defendants would unfairly prejudice those parties.
>
> [75] The ***Class Proceedings Act*** is ***sui generis*** legislation which envisions the balancing of interests between the parties. Through legislative foresight, the court has been given the necessary power to adapt procedures to ensure that the interests of all parties can be adequately protected in situations where those interests conflict. Here, the benefits of the settlement to the plaintiffs favour the approval of the settlement as presented, including the contentious prohibitive provisions. As I have stated above, these provisions do not occasion any substantive prejudice to the defendants. The procedural concerns may be adequately addressed through the terms on which the settlement is approved.

[38] The language of the ***B.C. Act*** is similar to the ***Ontario Statute***. S. 12 of the ***B.C. Act*** states:

> 12. The court may at any time make any order it considers appropriate regarding the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the

> parties, the terms it considers appropriate.

[39] S. 13 provides:

> 13. The court may at any time stay any proceedings relating to the class proceeding on the terms the court considers appropriate.

[40] In my view this language illustrates that the legislature contemplated the possibility that the presiding judge in a class proceeding may need to make an order not contemplated in the specific wording of the ***Act***. I concur with Winkler J.'s view that this statutory language provides the court with the "necessary power to adapt procedures to ensure that the interests of all parties can be adequately protected in situations where those interests conflict".

[41] In the case at bar, a bar order is particularly appropriate. The contract of insurance was issued in Quebec and since that province is a direct action jurisdiction, Instrumentarium's insurer is exposed to a direct claim. There is a real concern that despite having paid out its limits under the policy, Instrumentarium's insurer could be called upon to defend Instrumentarium and/or itself in existing and future actions. In addition, Instrumentarium is without assets and no longer carries on business. In the absence of a bar order, Instrumentarium or its insurer could still be called upon to

attend and defend an action notwithstanding a complete lack of assets.

[42] By agreeing to pay out its policy limits now, Instrumentarium and the insurer seek to purchase for themselves judicial certainty which will be denied if they are forced to defend future or existing allegations of class members even indirectly through third party proceedings in respect of whom they have already made payment.

[43] Even if Instrumentarium were to be kept in the Ontario, Alberta and Manitoba proceedings, there would be no benefit to the opposing parties since it has no assets and all the insurance proceeds are being paid out. Those third parties would, when facing joint and several liability, have to pay more than their fair share in any event particularly given the Ontario, Alberta and Manitoba law regarding joint and several liability. In those jurisdictions, unlike in British Columbia, the liability of joint tort-feasors continues to be joint and several, even if the court finds contributory negligence on the part of a plaintiff.

[44] The proposal in the case at bar provides a credit to the non-settling party in the amount of any judgment received by a class member in the action. In my view this proposal most closely reflects what would actually transpire in a "limited

fund" case with a finding of joint and several liability in any event.

DISPOSITION RE. BAR ORDER

[45] Accordingly the bar order will be granted on the terms sought by Instrumentarium.

"D. Brenner J."