

COURT FILE NUMBER: Q.B. No. 247 of A.D. 2008

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE: SASKATOON

PLAINTIFFS: SEAN SCHROEDER,
ELEANORE SMIROLDO, as LITIGATION GUARDIAN for
EDEN BOBYK and
ALLISTER CURTIS VEINOT

DEFENDANTS: DJO CANADA, INC.,
DJO, LLC,
McKINLEY MEDICAL LLC,
McKINLEY MEDICAL CORPORATION and
CURLIN MEDICAL INC.

Proceeding under *The Class Actions Act*, SS 2001

DISTRIBUTION PROTOCOL

RECITALS:

WHEREAS the Plaintiffs commenced this action as a proposed class action on February 29, 2008;

AND WHEREAS the action was certified as a class proceeding by the Court on March 29, 2010, with an appeal dismissed by the Saskatchewan Court of Appeal on September 21, 2011;

AND WHEREAS the parties signed Minutes of Settlement on January 28, 2016 (the "Settlement Agreement") in which the Defendants have agreed to resolve the claims of the class by payment to the class of a lump sum in the amount of \$10,145,000.00;

AND WHEREAS that settlement agreement is subject to court approval;

AND WHEREAS, if the settlement agreement is approved, then the Court will need to determine a fair and efficient means of distribution settlement monies to eligible class members, and also for directing payment of counsel fees, disbursements, taxes, and the subrogated claims of provincial health insurers;

AND WHEREAS, the Plaintiffs and Class Counsel, having reviewed detailed expert evidence concerning the nature and extent of class members' damages, and the similarity of class members' experiences, and having considered the administrative costs of distributing funds to eligible class members, have determined that the fairest and most efficient means of distributing settlement funds is for all eligible class members to share equally in the proceeds of the settlement;

ACCORDINGLY, the Plaintiffs and Class Counsel recommend, for approval by the Court, the following distribution protocol which provides for the fair and efficient distribution of monies to eligible class members, as well as payment of debts owed by the class.

SECTION 1 - DEFINITIONS

1.1 For the purposes of this Distribution Protocol, including its recitals, the following definitions apply:

- a) "Account" means an interest bearing trust account under the control of the Claims Administrator at a Schedule 1 chartered Canadian bank. All interest accrued will be added to the fund used to compensate Approved Claimants.
- b) "Action" means *Schroeder et al v. DJO Canada Inc., et al*, Saskatchewan Court File No. Q.B. No 247 of A.D. 2008
- c) "Additional Class Member" means a Claimant who satisfies the criteria at section of this Distribution Protocol.
- d) "Administrative Costs" means the costs of the Claims Administrator in administering this settlement, including trust account taxes and tax preparation.

- e) “Approval Hearing” means the hearing at the Court to approve the settlement of the Action and the terms of the Settlement Agreement and this Distribution Protocol.
- f) “Approval Order” means the Order of the Court approving the settlement and the terms of the Settlement Agreement and Distribution Protocol
- g) “Approved Claimant” means an Identified Class Member or an Additional Class Member.
- h) “Certification Order” means the certification order of Chief Justice Popescul, dated March 31, 2010.
- i) “Claim” means a claim made under this Distribution Protocol by a Claimant.
- j) “Claimant” means a Class Member, or their estate or legal representative, other than an Identified Class Member, who delivers a Claim Form by the Claims Deadline.
- k) “Claims Administrator” means the persons or entities appointed by the Court to administer the claims process in accordance with the Distribution Protocol.
- l) “Claims Deadline” means 60 days after first publication of the Notice of Settlement Approval.
- m) “Claim Form” means a form, along with the required supporting documentation, in substantially the form as set out at Schedule D of this Distribution Protocol, which is submitted by a Claimant to the Claims Administrator prior to the Claims Deadline.
- n) “Class Counsel” means Klein Lawyers.
- o) “Class Counsel Fee” means the fees, disbursements, and taxes awarded to Class Counsel by the Court.

- p) “Class Member” means all persons resident in Saskatchewan and elsewhere in Canada who used the Defendants’ pain pump sold under the brand name “DonJoy Pain Control Device” and who claim to have suffered injury a result of such use.
- q) “Class Period” means the period that runs from January 1, 2004 to September 30, 2008.
- r) “Compensation Fund” means the Settlement Amount, less deductions
- s) “Court” means the Court of Queen’s Bench of Saskatchewan.
- t) “Court Approval Date” means the later of:
- i. 31 days after the date on which the Court issues the Approval Order if there is no appeal from the Approval Order; and
 - ii. 31 days after the date on which any appeals from the Approval Order have been finally disposed of if there is an appeal from the Approval Order.
- u) “Distribution Protocol” means this document.
- v) “Identified Class Member” means a person listed at Schedule A of this Distribution Protocol. For copies of this schedule filed with the Court, or otherwise available to the public, this schedule may be redacted, or sealed, or the Identified Class Members may be listed by their initials only, to preserve the privacy of these individuals.
- w) “Notice of Settlement Approval” means a document in substantially the form listed at Schedule B of this Distribution Protocol.
- x) “Notice Plan” means the plan for publishing the Notice of Settlement Approval as set out at Schedule C to this Distribution Protocol.

- y) “PCD” means a DonJoy Pain Control Device;
- z) “Plaintiffs” means Sean Schroeder, Curtis Veinot and Eden Bobyk;
- aa) “Public Health Insurers” means all of the Canadian Provincial and Territorial Ministries of Health or equivalents, and/or Provincial and Territorial Governments, and/or publicly funded plans for health care in Canada.
- bb) “Public Health Insurer Claim” means monies deducted from the Settlement Amount to pay for the subrogated claims of the Public Health Insurers.
- cc) “Settlement Agreement” means the Minutes of Settlement signed January 28, 2016.
- dd) “Settlement Amount” means that the Defendants have agreed to pay to settle the Action which totals \$10,145,000.00
- ee) “Surgery” means a shoulder surgery (arthroscopic bankart, arthroscopic rotator cuff, subacromial decompression, arthroplasty, or capsular shift) or a knee surgery (arthroscopy, ACL reconstruction, total knee replacement, cruciate ligament reconstruction, lateral releases, patella realignments, regenerative chondroplasty or meniscal repairs).

SECTION 2 - APPROVAL HEARING AND NOTICE

- 2.1 The Settlement Agreement and Distribution Protocol are subject to approval of the Court.
- 2.2 Prior to the Approval Hearing, Class Counsel shall seek an order of the Court regarding the provision of appropriate notice of the Approval Hearing to Class Members.

2.3 Immediately following Court Approval Date, Class Counsel shall arrange for publication of the Notice of Settlement Approval in accordance with the Notice Plan.

SECTION 3 – TRANSFER OF SETTLEMENT PROCEEDS

3.1 Following approval of the Settlement Agreement, monies owed by the Defendants under the Settlement Agreement, which have been, or which will be paid into trust with McDougall Gauley LLP, shall be transferred as follows:

(a) monies held by McDougall Gauley LLP in trust for the benefit of the Class pursuant to the terms of the Settlement Agreement, as of the Court Approval Date, shall be paid to Klein Lawyers in trust, within 35 days of the Court Approval Date; and

(b) monies received by McDougall Gauley LLP in trust for the benefit of Class, pursuant to the terms of the Settlement Agreement, after the Court Approval Date, shall be paid to Klein Lawyers in trust, within 35 days of receipt.

SECTION 4 – PAYMENT OF CLASS DEBTS

4.1 Upon receipt of the Settlement Amount, or a portion thereof, Class Counsel may deduct such monies as are necessary to pay:

- (a) The Class Counsel Fee;
- (b) Notice Costs; and
- (c) Administrative Costs.

4.2 Depending on the number of Claim Forms submitted, the volumes of evidence provided by Claimants, the number of adjudications made by the Claims Administrator, and the appeals brought thereafter, the Administrative Costs may extend over a period of time. Class Counsel or the Claims Administrator may draw from the Settlement Amount as necessary to pay for the Administrative Costs.

4.3 Upon receipt of the Settlement Amount, or a portion thereof, Class Counsel may further deduct such monies as are necessary to pay Provincial Health Insurer Claims which are quantified as follows:

- (a) Saskatchewan Ministry of Health \$100,000; and
- (b) Alberta Ministry of Health \$1590.98

4.4 Remaining monies, after paying the Class Counsel Fee, Notice Costs, Administrative Costs and the Public Health Insurer Claims constitute the Compensation Fund.

4.5 Class Counsel may elect to keep the Compensation Fund in its trust account until payment can be made to Approved Claimants pursuant to section 9. Alternatively, Class Counsel may elect to have the Claims Administrator manage some or all of the Compensation Fund prior to its distribution pursuant to section 9.

SECTION 5 – SUBMITTING A CLAIM

5.1 To be eligible for compensation under the Settlement Agreement, Claimants must submit a Claim Form to the Claims Administrator by the Claims Deadline.

5.2 The Identified Class Members are deemed to have already complied with section 5.1 above, and are not required to submit a Claim Form to the Claims Administrator by the Claims Deadline.

5.3 Claimants may make a Claim by delivering a completed Claim Form with all supporting documentation to the Claims Administrator prior to the Claims Deadline. If a Class Member does not deliver a Claim Form prior to the Claims Deadline, the Claimant shall not be entitled to any compensation.

5.4 Mailed or couriered Claim Forms received after the Claims Deadline but post marked or deposited with the courier on or before the Claims Deadline will be deemed received on the post marked date or the date deposited with the courier. E-mailed or faxed Claim Forms will be deemed received on the date received by the Claims Administrator.

5.5 A Claimant shall not submit more than one Claim Form. In particular, a Claimant shall submit one Claim Form that comprises all claims he or she may have. If more than one Claim Form is submitted, the Claims Administrator will treat them as one Claim Form.

5.6 If, for any reason, a Class Member is unable to complete the Claim Form then it may be completed by the Class Member's personal or legal representative.

5.7 It is the responsibility of the Claimant to provide sufficient medical evidence to support his or her Claim. The Claimant may wish to hire a lawyer or other professional of her own choosing to assist with this process. Any fees or charges incurred by the Claimant with respect to filing his or her Claim are the responsibility of the Claimant.

SECTION 6 – ELIGIBILITY DETERMINATION

6.1 To establish eligibility for compensation, a Claimant must provide the Claims Administrator with proof, on or before the Claims Deadline, establishing that:

- (a) the Claimant, if the legal or estate representative of the Class Member, has authority to act;
- (b) the Class Member underwent Surgery in Canada during the Class Period;
- (c) a PCD was used immediately following the Surgery to administer local anesthetic to the Class Member;
- (d) the catheter of the PCD was placed intra-articularly following the Surgery;

- (e) the PCD operated continuously for at least 24 hours following the Surgery and it administered at least 100 ml of local anaesthetic to the Class Member while it was operating;
- (f) the Class Member received a diagnosis of chondrolysis from a Canadian orthopedic surgeon prior to January 28, 2016;
- (g) there must be medical evidence that would be consistent with the Class Member's chondrolysis having begun within one year after the Surgery in which a PCD was used. Such evidence may include medical records or reports indicating a loss of cartilage, and/or pain, disability and loss of range of motion in the affected joint.

6.2 The following documentary proof may be used by a Claimant to satisfy the various criteria at section 6.1:

- (a) With respect to 6.1(a), a power attorney, a will, a Claim Form completed by counsel, or other legal documentation may be sufficient;
- (b) With respect to s.6(1)(b) to (g), the Claimant may provide copies of medical records, operative reports, clinical notes, hospital records, product identification stickers, or other medical documentation to establish these criteria.
- (c) With respect to s.6(1)(d), the Claimant must either provide contemporaneous medical documents, such as a post-operative report, indicating the placement of the Surgery, or alternatively, the Claimant may provide a subsequent signed statement or letter from the treating surgeon concerning the Surgery, and stating that the treating surgeon would have used the PCD intra-articularly based either on his or her recollection of the Surgery, or based upon his or her recollection of his or her usual surgical practice at the time of the Surgery.

6.3 If the Surgery performed on the Class Member was performed by Dr. Mario Taillon, or Dr. Mark Ernst, or David Kim between January 1, 2004 and January 6, 2006, then a reference in the operative report of the Class Member to a “painbuster” is deemed to be proof that a PCD was used.

6.4 The burden rests on the Claimant to establish eligibility under the Settlement Agreement.

6.5 With respect to 6.1(f), expert medical opinions prepared after the date that the Settlement Agreement was signed on January 28, 2016 are not sufficient to satisfy this particular requirement. The Claimant must provide medical documentation from a Canadian orthopedic surgeon which was authored prior to January 28, 2016 confirming a diagnosis of chondrolysis.

SECTION 7 – ADJUDICATION OF CLAIMS

7.1 Where the Claims Administrator is satisfied that Claimant has met the criteria in section 6, the Claims Administrator shall designate that Claimant as an Additional Class Member.

7.2 Where a Claim Form contains minor omissions or errors, the Claims Administrator may correct such omissions or errors if the information to correct the error or omission is readily available to the Claims Administrator.

7.3 The Claims Administrator may make inquiries of a Claimant or request that the Claimant provide additional documentation in the event of any concerns, ambiguities or inconsistencies in the Claim. If a Claimant has a lawyer, all inquiries or requests will be sent to the lawyer. If the Claims Administrator does not receive the additional information requested or follow-up answers to incomplete forms from a Claimant within 90 days after advising the Claimant of the Claim deficiency, the Claim shall be assessed on the basis of the material provided by the Claimant.

7.4 The Claims Administrator shall make best efforts to adjudicate a Claim and render a decision as to the Claimant’s eligibility within 60 days of receipt of a Claim.

7.5 The Claims Administrator shall provide its decision in writing by way of a letter or email to the Claimant. If a Claimant has a lawyer, the decision will be sent to the lawyer.

SECTION 8- APPEALS

8.1 A Claimant may appeal the decision of the Claims Administrator within 30 days of issuance of the decision. The Claimant must notify the Claims Administrator and Class Counsel in writing of their intent to appeal the decision. The appeal will be determined by the Court on the basis of written submissions without oral hearing.

8.2 The judgment of the Court respecting any appeal from the Claims Administrator's decision is final and binding and shall not be subject to any further appeal.

SECTION 9 – PAYMENT OF COMPENSATION

9.1 If, following the expiry of the Claims Deadline, the Claims Administrator determines that it has not received any Claims Forms from Claimants, then Class Counsel may distribute the Compensation Fund equally among the Identified Class Members with no further involvement required of the Claims Administrator. That is, each of the 49 Identified Class Members would receive a 1/49th share of the Compensation Fund.

9.2 If the Claims Administrator determines that there are no Additional Class Members, and any appeals from such determinations have been dismissed by the Court, or the time for bringing them has expired, then Class Counsel may distribute the Compensation Fund equally among the Identified Class Members with no further involvement required of the Claims Administrator. That is, each of the 49 Identified Class Members would receive a 1/49th share of the Compensation Fund.

9.3 If the Claims Administrator determines that there are indeed Additional Class Members, or such determination is made on appeal, then the Compensation Fund shall be shared equally amongst the Approved Claimants, which would included both the Indentified Class Members and

the Additional Class Members. For example, if there was 1 Additional Class Member and 49 Identified Class Members, then there are a total of 50 Approved Claimants, and each of these persons would receive a 1/50th share of the Compensation Fund.

9.4 Where there are Additional Class Members, the Claims Administrator and Class Counsel may decide amongst themselves as to the most efficient manner of sending cheques to the Additional Class Members and the Identified Class Members.

SECTION 10 – MANAGEMENT OF FUNDS

10.1 Distribution of the Compensation Fund to Approved Claimants may be made in instalments as funds are available.

10.2 The Claims Administrator may maintain the Account in which may be deposited the Compensation Fund, or a portion thereof.

10.3 If there are amounts remaining in the Compensation Fund because of an Approved Claimant not cashing a compensation cheque for 12 months or longer after the date of issuance of the cheque, and all other financial commitments have been met to implement the settlement, the remaining amounts will be distributed pro rata to all other Approved Claimants. If the Claims Administrator is of the view that the amounts remaining in the Compensation Fund are insufficient to warrant a pro rata distribution, then the Claims Administrator will, in its sole discretion, donate the remaining amounts to an appropriate charity or charities in Saskatchewan.

SECTION 11 - SCHEDULES

11.1 The Schedules to this Distribution Protocol are as follows:

- (a) Schedule “A”: List of Identified Class Members;
- (b) Schedule “B”: Notice of Settlement Approval;

- (c) Schedule “C”: Notice Plan; and
- (d) Schedule “D” Claim Form.

SCHEDULE A: LIST OF IDENTIFIED CLASS MEMBERS (Initials only)

No.	Last name	First Name
1	A.	M.
2	A.	L.
3	A.	W.
4	A.	L.
5	O.	J.
6	B.	N.
7	B.	L.
8	B.	E.
9	B.	T.
10	B.	P.
11	B.	H.
12	C.	L.
13	C.	J.
14	D.	B.
15	D.	B.
16	D.	S.
17	G.	R.
18	G.	A.

19	G.	G.
20	H.	S.
21	H.	L.
22	H.	D.
23	H.	D.
24	J.	A.
25	K.	K.
26	K.	C.
27	K.	T.
28	L.	R.
29	L.	B.
30	M.	T.
31	M.	A.
32	M.	T.
33	M.	D.
34	M.	S.
35	N.	H.
36	N.	J.
37	P.	C.
38	R.	A.
39	R.	S.
40	R.	A.
41	S.	S.

42	S.	R.
43	S.	C.
44	T.	S.
45	T.	J.
46	T.	M.
47	T.	T.
48	V.	C.
49	W.	K.

SCHEDULE B: NOTICE OF SETTLEMENT APPROVAL

NOTICE OF APPROVAL OF SETTLEMENT OF DONJOY PAIN CONTROL DEVICE CLASS ACTION

If you or someone close to you suffered injury of the knee or shoulder after surgery involving use of a DonJoy Pain Control Device, this notice may affect your legal rights.

On [date], the Court of Queen's Bench for Saskatchewan approved a settlement of the class action *Schroeder et al. v. DJO Canada Inc., et al.* This class action concerned allegations that the Defendants' medical device caused chondrolysis to the affected joint when used intra-articular in shoulder or knee surgery.

Who is Eligible for the Settlement?

To be eligible to participate in this settlement you must be a member of the class, or the estate or legal representative of a class member.

The class is defined as:

“All persons resident in Saskatchewan and elsewhere in Canada who used the defendants' pain pump sold under the brand name “DonJoy Pain Control Device” and who claim to have suffered injury a result of such use.”

What are the Terms of the Settlement?

You can obtain a copy of the settlement agreement by contacting Class Counsel or the Claims Administrator at the addresses below. In summary, the Defendants agreed to pay compensation to settle the allegations in the lawsuit. This money is available to compensate class members, and to pay public health insurers for their subrogated costs, as well as to pay legal fees and expenses related to the prosecution of this class action.

How Do I Make A Claim For Compensation?

If you have previously contacted Class Counsel, and have provided supporting medical documentation to Class Counsel, you might already be eligible for this settlement. You should check with Class Counsel to confirm your eligibility.

If you have not previously contacted Class Counsel, and provided supporting medical documentation, then you must complete a Claim Form, and submit it, together with supporting medical documentation, to the Claims Administrator on or before [deadline].

For More Information and to Obtain a Claim Form

For more information about the lawsuit or to obtain a Claim Form, contact Class Counsel at:

Klein Lawyers
400-1385 West 8th Avenue
Vancouver, BC V6H 3V9

Telephone: 604-714-6159
Website: [address]

Or contact the Claims Administrator at:

[address]

Schedule C: Notice Plan

1. Class Counsel shall send a copy of the Notice of Settlement Approval Hearing by mail or email to all persons who have retained Class Counsel for the purposes of this class action.

2. Class Counsel shall post a copy of the Notice of Settlement Approval Hearing to the internet.

3. Class Counsel shall mail a copy of the Notice of Settlement Approval to every orthopedic surgeon in Canada as listed on the websites of each province's College of Physicians and Surgeons with a request that each surgeon pass on the Notice of Settlement Approval Hearing to any patients who may be class members consistent with each surgeon's obligations under paragraph 14 of the *Canadian Medical Association Code of Ethics*, 2004.

SCHEDULE D: CLAIM FORM

Please submit your completed Claim Form by mail, together with supporting medical documentation postmarked no later than MM/DD/YYYY, to:

Settlement Administrator
Suite 3-505 133 Weber Street North
Waterloo, ON N2J 3G9

Note: If you have previously contacted Class Counsel, and had already provided supporting medical documentation, it might not be necessary for you to complete this Claim Form. Please check with Class Counsel to confirm.

If you have not previously contacted Class Counsel, or have not previously provided Class Counsel with supporting medical documentation, then you must complete and submit this Claim Form, together with supporting medical documentation, to the Claims Administrator by the MM/DD/YYYY.

1. CLAIMANT INFORMATION

Please provide the name of the person, whether living or deceased, who is a member of this class action, and for whom compensation is sought.

First Name

Middle

Last Name

Apartment/Unit #

Address

City

Province

Postal Code

(_____)_____

Telephone Number

(_____)_____

Cell Number

Email

Provincial Health Insurance Number

Date of Birth (mm/dd/yyyy)

2. LEGAL OR ESTATE REPRESENTATIVE

Please complete this information if you are making this claim on behalf of a Claimant, whether living or deceased.

First Name

Middle

Last Name

Apartment/Unit #

City

Province

Postal Code

()

Telephone Number

()

Cell Number

Email

Your relationship to the Claimant

Please attach to this Claim Form document(s) showing your legal authority to act on behalf of the Claimant, such a Power of Attorney, Letters of Administration, a Will, Death Certificate, etc.

I have attached these documents: Yes No

3. LAWYER INFORMATION

If a lawyer has been hired to assist you in making this claim, please complete this information.

I have hired a law firm to assist me. Yes No

The Lawyer assisting me is:

Name of Law Firm

First Name

Last Name

Address

City

Province

Postal Code

()

Telephone Number

Email

4. REQUIRED MEDICAL INFORMATION

To be eligible for compensation, the Claimant must provide supporting medical documentation which establishes the following.

- (a) that the Claimant underwent one or more of the following surgeries in Canada (“Surgery”):
shoulder surgeries: (arthroscopic bankart, arthoscopic rotator cuff, subacromial decompression, arthroplasty, or capsular shift) or

knee surgeries (arthroscopy, ACL reconstruction, total knee replacement, cruciate ligament reconstruction, lateral releases, patella realignments, regenerative chondroplasty or meniscal repairs);
- (b) The Surgery took place between January 1, 2004 and September 30, 2008;
- (c) A DonJoy Pain Control Device (“PCD”) was used immediately following the Surgery to administer local anesthetic to the Claimant;
- (d) the catheter of the PCD was placed intra-articularly following the Surgery;
- (e) the PCD operated continuously for at least 24 hours following the Surgery and it administered at least 100 ml of local anaesthetic to the Claimant while it was operating;
- (f) the Claimant received a diagnosis of chondrolysis from a Canadian orthopedic surgeon prior to January 28, 2016; and
- (g) there must be medical evidence that would be consistent with the Class Member’s chondrolysis having begun within one year after the Surgery in which a PCD was used. Such evidence may include medical records or reports indicating a loss of cartilage, and/or pain, disability and loss of range of motion in the affected joint.

The Claimant may attach doctor’s records, hospital records, post-operative reports, product identification stickers, and other medical documentation to prove the above. It is the Claimant’s obligation to prove the above information. A medical report prepared by a Canadian orthopedic surgeon after January 28, 2016 is not proof of a diagnosis of chondrolysis. Such diagnosis must have been made before the date of this settlement.

Please identify the Surgery or Surgeries:

Date of Surgery(ies): _____

Doctor(s) who performed Surgery(ies): _____

Hospital(s) Where Surgery(ies) Performed: _____

Type of Shoulder or Knee Surgery(ies): _____

Was a PCD used following the Surgery? Yes No

Where was the catheter of the PCD placed? _____

What drugs were administered by the PCD and in what dose? _____

How long did the PCD remain in operation? _____

When was the Claimant diagnosed with chondrolysis? _____

Who made this diagnosis? _____

Please provide a copy of all medical records necessary to prove the above information, including a copy of the medical report in which a diagnosis of chondrolysis was made.

I have attached these documents: Yes No

5. DECLARATION

I declare under penalty of perjury that all of the information provided in the Claim Form is true and correct.

Signature _____ Date _____

mm/dd/yyyy

Print Name _____