Date: 19970214
Docket: C954330
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

HELEN HARRINGTON, as representative Plaintiff

PLAINTIFF

AND:

DOW CORNING CORPORATION, DOW CORNING CANADA INC. THE DOW CHEMICAL COMPANY, DOW CORNING-WRIGHT CORPORATION,

McGHAN MEDICAL CORPORATION, McGHAN NUSIL CORPORATION, MINNESOTA MINING AND MANUFACTURING COMPANY (3M), INAMED CORPORATION, UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., UNION CARBIDE CORPORATION,

BAXTER INTERNATIONAL INC., BAXTER HEALTHCARE CORPORATION, MENTOR CORPORATION, AND

BRISTOL-MYERS SQUIBB COMPANY, MEDICAL ENGINEERING CORPORATION, THE COOPER COMPANIES, INC.

DEFENDANTS

Brought under the ***Class Proceedings Act***

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE K.C. MACKENZIE

Counsel for the Plaintiff:	Ms. D.A. Acheson Q.C. M.R. Steven D.A. Klein K. Whitley C.G. Docken Ms. G. Bembridge
Counsel for the Defendants	
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The Dow Chemical Company:	R.G. Ward J. S. McLean
McGhan Medical Corporation, Inamed Corporation:	B.E. McLeod
Minnesota Mining and Manufacturing Company (3M):	J.K. McEwan Ms. S. Silber
Union Carbide Chemicals and Plastics Company Inc., Union Carbide Corporation:	M.R. Storrow Q.C. Ms. K. Bayne
Baxter International Inc., Baxter Healthcare Corporation:	O.W. Ilnyckyj Ms. M.A. Worfolk
Bristol-Myers Squibb Company, Medical Engineering Corporation, The Cooper Companies, Inc.:	W.S. Berardino Q.C. A.P. Seckel
Counsel for the Attorney General of British Columbia	H.M. Groberman
Place and Date of Hearing:	Vancouver, B.C. January 6, 7, 8, 1997

[1] This is an action for damages against manufacturers and distributors of breast implants. It was certified as a class proceeding under the ***Class Proceedings Act***, S.B.C. 1995, c. 21, on April 11, 1996. Certain issues relating to the certification order, including the extent of a non-resident sub-class, were deferred for further argument. The plaintiff, by this application, seeks to include "all women who have been implanted with one or more breast implant mammary prosthetic devices and are resident in Canada, anywhere other than Ontario and Quebec, or were implanted in Canada, anywhere other than Ontario and Quebec".

[2] The defendants do not contest the recognition of a non-resident class *per se* but they contend it should be limited to women, now non-resident, who were implanted in B.C. They argue further that the B.C. resident sub-class must also exclude women who were implanted outside the province because this court does not have jurisdiction over those claims.

[3] The backdrop to the argument is the judgment of the Supreme Court of Canada in ***Tolofson v. Jensen***, [1994] 3 S.C.R. 1022. That case involved a motor vehicle collision in Saskatchewan between a car occupied by B.C. residents, including the plaintiff passenger, and a car driven by a Saskatchewan resident. The action was statute-barred in Saskatchewan when the plaintiff commenced an action in British Columbia, within the B.C. limitation period. The case reached

the Supreme Court of Canada together with a similar case involving Ontario residents injured in a collision in Quebec with a Quebec motorist. In each case the Supreme Court decided that the law where the accident occurred and not the law of the forum applied.

[4] ***Tolofson v. Jensen***, *supra*, was primarily concerned with choice of law. No issue was raised with respect to the jurisdiction of the British Columbia court to hear the case although the decision that the Saskatchewan limitation period applied effectively ended it. The B.C. court was simply required to apply Saskatchewan law in determining the substantive issues, including limitations. It is clear that the Supreme Court did not consider choice of law and jurisdiction to be co-extensive. A court in a place other than the *lex loci delicti* may take jurisdiction if there is "a real and substantial connection" to the forum to warrant its exercise of jurisdiction (at p. 1049). In some circumstances the forum court may have jurisdiction but decline to accept it on grounds of *forum non conveniens*. The defendants here rely on *forum non conveniens* as a fallback position but their main emphasis was on lack of jurisdiction. Essentially, the defendants say that a woman implanted in another jurisdiction has no connection to B.C. British Columbia was not the place where the implant surgery was performed nor the place where the implants were manufactured. The defendants are before the court only with respect to claims of women implanted in British

Columbia [see ***Moran v. Pyle National (Canada) Ltd.***, [1975] 1 S.C.R. 393] and that jurisdiction does not provide a foundation for the separate claims of women who independently have no "real and substantial connection" to British Columbia. ***Canadian International Marketing Distribution Ltd. v. Nitsuko Ltd.*** (1990), 68 D.L.R. (4th) 318, (B.C.C.A.); ***Ell v. Con-Pro Industries Ltd.*** (1992), B.C.A.C. 174 (C.A.).

[5] A non-resident woman whose entire implant medical history has no connection to British Columbia must have her claim determined by the law of a jurisdiction other than British Columbia. This is particularly significant to limitation issues as the B.C. legislature has at least purported to remove any limitation period for implants containing silicone for actions commenced on or before December 31, 1995: ***The Limitation Amendment Act***, S.B.C. 1994, c. 8, s. 4. (Saskatchewan has passed a similar limitation amendment for actions commenced on or before December 31, 1998: ***The Limitation of Actions Amendment Act***, S.S. 1996, c. 31). If this court were to take jurisdiction over such claims it would be required to apply the limitations and other substantive law of other jurisdictions in determining such claims.

[6] A more troublesome choice of law issue arises where, for example, a woman was implanted in Alberta but had the implants "explanted" or removed in British Columbia after an implant

rupture or other complication. In ***Tolofson***, La Forest J. observed (at p. 1050):

> There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There territorial considerations may become muted; they may conflict and other considerations may play a determining role.

[7] There are likely to be claims where implants have been manufactured in one jurisdiction, implanted in a second, and removed in a third. Some women may have had surgical implants more than once. The thorny choice of law issue to which La Forest J. has referred is not directly before the court on this application but it is lurking in the background if any but the narrowest view of the appropriate class is adopted.

[8] The issues on this application are whether this court can assume jurisdiction over claims subject to the substantive law of other Canadian jurisdictions and, if it can, whether B.C. is the *forum conveniens*. Plaintiff's counsel have been contacted by approximately 600 women from outside B.C., most of them resident in Alberta and Saskatchewan. Counsel from those two provinces representing some of those women appeared on this application and supported their inclusion. I was advised that many of the women have modest claims and the economics of

litigation of individual claims are prohibitive. In short, it was contended that participation in the B.C. class proceedings is the only practical means by which their claims can be advanced.

[9] The ***Class Proceedings Act*** contemplates a class which includes non-residents by requiring subdivision of such a class into resident and non-resident sub-classes (s. 6(2)). Non-residents may only be included in a B.C. class proceeding if they opt in (s. 16(2)), unlike B.C. residents who are normally included automatically unless they opt out. The non-resident opt-in procedure avoids potential difficulties in exercising jurisdiction over class members outside the province who have not taken any initiative to attorn to the jurisdiction of the B.C. court.

[10] Counsel for the Attorney General agreed with the general view that the provisions of the ***Class Proceedings Act*** are procedural only and do not purport to extend the jurisdiction of the British Columbia courts beyond the limits constitutionally recognized. I am satisfied that the legislation is sufficiently open-ended that it can be read as confined by necessary implication to the limits of provincial jurisdiction, whatever those limits are, and no question of the constitutionality of the statute therefore arises. In practical terms, however, the B.C. legislature has enacted a procedure not available in other provinces and territories,

Ontario and Quebec excepted, which facilitates the litigation of multiple claims on a class basis. Should residents of other jurisdictions in Canada, having no individual connection to B.C. jurisdiction, be permitted to avail themselves of the B.C. procedure essentially because a similar procedure is unavailable at home? British Columbia is not the jurisdiction of manufacture of breast implants and the availability of class proceedings here is the main reason why non-residents seek to participate.

[11] The defendants contend that recognition of a broad non-resident sub-class is an unwarranted intrusion into other jurisdictions and interferes with the evident choice of those jurisdictions not to allow class proceedings. They contend that order and fairness require that the choices of the other jurisdictions be respected. They raise the spectre of British Columbia as "Texas north", and class proceedings as an undesirable growth industry taking scarce resources of the courts at the expense of domestic litigation with greater merit. Counsel for the plaintiff respond that the extension of B.C. class proceedings to non-residents was a conscious policy decision of the B.C. legislature and that it is not for the courts to second-guess the legislature's decision, providing constitutional limits of jurisdiction are respected. I have already stated above that I am satisfied the legislation does not attempt to exceed constitutional limits, but neither does it attempt to define those limits.

[12] Counsel for the plaintiff rely on ***Nantais v. Telelectronics Proprietary (Canada) Ltd.*** (1995), 127 D.L.R. (4th) 552 (Ont.Gen.Div.); leave to appeal denied (1995), 40 C.P.C. (3d) 263 (Ont.Div.Ct.). The Ontario courts approved class proceedings against the manufacturer of cardiac pacemaker leads on behalf of a national class. The leads were manufactured in the United States and France and marketed across Canada through Ontario distributors related to the manufacturer. The aspect of the national class which most concerned the Ontario courts was the problem of "passive non-residents" who would be included unless they opted out. That issue does not arise under the B.C. statute which requires non-residents to opt in.

[13] ***Nantais***, *supra*, is a considered decision on a similar but more far-reaching statute. The leading cases in the Supreme Court of Canada, ***Morguard Investments Ltd. v. De Savoye***, [1990] 3 S.C.R. 1077 and ***Hunt v. T & N plc***, [1993] 4 S.C.R. 289, are discussed and applied. In the Divisional Court, Zuber J. commented (at p. 267-8):

> On a more practical level it is argued that a court attempting to try this class proceeding will face a multiplicity of laws from all the provinces, which may confuse the matter. This argument, in my view, is largely speculative. I am not aware of any difference in the law respecting product liability or negligence in the common law provinces and I have not been shown that there is any real difference between the common law on this matter and the law in the province of Quebec.

[14] Apart from differences in limitation periods in the various provinces, the ***Negligence Act*** of British Columbia, R.S.B.C. 1979, c. 298) differs significantly from similar legislation in other provinces. In instances where there is contributory fault on the part of the person sustaining injury or damage, the liability of other persons at fault is several only for the share of damages represented by the degree of fault, not joint and several: ***Cominco Ltd. v. Canadian General Electric Co.*** (1983), 50 B.C.L.R. 145 (C.A.); ***Leischner v. West Kootenay Power & Light Co.*** (1986), 70 B.C.L.R. 145 (C.A.). Joint and several liability is limited to cases where there is no contributory fault on the part of the person injured. Parallel statutes in other Canadian jurisdictions do not make this distinction and liability of other tortfeasors is generally joint and several irrespective of contributory fault. The B.C. ***Negligence Act*** also avoids the use of the term "tortfeasor", extending its application to breach of contract and other non-tortious fault. Breast implant litigation raised the prospect of potential liability of doctors and other "learned intermediaries" as well as manufacturers: ***Hollis v. Birch***, [1996] 2 W.W.R. 77 (S.C.C.). Contributory fault on the part of some class members is at least a possibility, with resulting differences in the extent of manufacturers' liability if a learned intermediary or some other third party is also at fault.

[15] Nonetheless, I am not persuaded that the differences between British Columbia and other jurisdictions in the context of this litigation are sufficiently problematic that the general view expressed in ***Nantais*** should be rejected on practical grounds. Problems of several liability are likely to be more troublesome for the resident sub-class than for non-resident claimants.

[16] ***Nitsuko***, *supra*, and ***Con Pro***, *supra*, clearly state that this court has no jurisdiction over non-resident claims standing alone. However, those decisions do not address the problem of mass tort claims spreading across provincial lines which raise the same issue of liability. The common issue is this case has already been defined: "Are silicone gel breast implants reasonably fit for their intended purpose?" Does that common liability issue establish a "real and substantial connection" sufficient to found jurisdiction over claims otherwise beyond this court's jurisdiction?

[17] In ***Amchem Products Inc. v. British Columbia (Workers' Compensation Board)***, [1993] 1 S.C.R. 897, Sopinka J. commented (at p. 911-2):

> With the increase of free trade and the rapid growth of multi-national corporations it has become more difficult to identify one clearly appropriate forum for this type of litigation. The defendant may not be identified with only one jurisdiction. Moreover, there are frequently multiple defendants carrying on business in a number of jurisdictions and

> distributing their products or services world wide. As well, the plaintiffs may be a large class residing in different jurisdictions. It is often difficult to pinpoint the place where the transaction giving rise to the action took place. Frequently, there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives.

[18] I think those comments are pertinent here, and they go to the jurisdictional issue and not just to *forum conveniens*. The demands of multi-claimant manufacturers' liability litigation require recognition of concurrent jurisdiction of courts within Canada. In such cases there is no utility in having the same factual issues litigated in several jurisdictions if the claims can be consolidated. I do not think that ***Nitsuko*** and ***Con Pro*** stand in the way of concurrent jurisdiction as they do not deal with claims inside and outside the province which raise the same common issue. It is that common issue which establishes the real and substantial connection necessary for jurisdiction. ***Nantais*** is a considered decision on the question which is otherwise largely a matter of first impression. I am not persuaded that ***Nantais*** is clearly wrong or inapplicable and accordingly I intend to follow it.

[19] Once jurisdiction is established, the question remaining is *forum conveniens*. I am satisfied that the ***Class Proceedings Act*** facilitates the efficient litigation of multiple claims and this jurisdiction is therefore a convenient forum. In ***Nantais***, both levels of court stressed that a certification order can be varied if unexpected problems arise. The same flexibility is

available under the B.C. statute. The common issue will not be made any more complicated by the inclusion of non-resident class members. The defendants may be deprived of the opportunity of trying that factual issue separately in several jurisdictions but, if that is prejudicial, it is outweighed by the advantage to the class members of having a single determination of a complex issue that can only be litigated at substantial cost. The choice of law rule laid down by the Supreme Court of Canada in ***Tolofson*** will ensure that the defendants will not lose the benefit of any substantive defences, including limitations, available for claims determinable under the law of other jurisdictions. If the plaintiff succeeds on the common issue, subsequent proceedings in this case will be more extensive because of the non-resident sub-class but they ought to be less costly than separate proceedings in different jurisdictions. Non-resident class members, by opting in, will assume the obligation of providing relevant medical records and other information that is necessary for the proper disposition of their claims.

[20] In the result, the definition of the non-resident sub-class as proposed by the plaintiff is approved. I am satisfied that Betty Gladu is an appropriate person to represent that sub-class. It follows from the reasons above that the resident class will include all implantees resident in B.C., irrespective of the jurisdiction of implant, although the inclusion of B.C. resident women implanted elsewhere will be

without prejudice to any choice of law issues with respect to their claims.

"K.C. Mackenzie, J."