

**CITATION:** Vester v. Boston Scientific Ltd., 2020 ONSC 1308

**COURT FILE NO.:** CV-15-527310 CP

**DATE:** 2020/02/28

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

SUSAN VESTER and DARIN VESTER

Plaintiffs

– and –

BOSTON SCIENTIFIC LTD. and BOSTON  
SCIENTIFIC CORPORATION

Defendants

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)  
) *Daniel E.H. Bach, Jill McCartney and*  
) *Elizabeth deBoer* for the Plaintiffs  
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) **HEARD:** In writing

**PERELL J.**

**REASONS FOR DECISION**

[1] The Defendants Boston Scientific Ltd. and Boston Scientific Corporation (collectively “Boston Scientific”) designed, manufactured, and sold transvaginal mesh medical devices that were implanted for the treatment of Stress Urinary Incontinence (“SUI”) or Pelvic Organ Prolapse (“POP”). The Plaintiff, Susan Vester, who suffered from SUI, had a Lynx transvaginal mesh device implanted, and she suffered painful complications. Mrs. Vester, along with her husband Darin Vester, commenced a proposed class action under the *Class Proceedings Act, 1992*.<sup>1</sup> In 2017, the action was certified as a class proceeding.

[2] The parties have entered into a \$21.5 million settlement. On this motion, the Vesters seek approval of the Notice of a Settlement Approval Hearing, the Notice Plan, and minor amendments to the 2017 Certification Order. Boston Scientific consents. The framework of the proposed settlement is similar to the settlement approved on November 8, 2019 in *Harper v. American Medical Systems Canada Inc.*,<sup>2</sup> another class action regarding mesh devices manufactured and distributed to treat SUI and POP.

[3] It is estimated that the settlement will provide compensation to approximately 325 women. They will share in the settlement proceeds based on the proposed distribution protocol, which seeks to provide compensation to class members based on the severity of their injuries. The

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<sup>1</sup> , S.O. 1992, c. 6. 1.

<sup>2</sup> *Harper v American Medical Systems Canada Inc*, 2019 ONSC 5723.

protocol creates a two-stage, extended claims process that will allow for payment of current claims as well as the payment of future claims from either woman experiencing new injuries or woman whose symptoms have worsened. It will also compensate the provincial health insurers for their subrogated claims.

[4] The current class definition is:

(a) all persons resident in Canada who have been implanted with the transvaginal mesh products listed below at any time on or before the date of the certification order, and which products were designed, developed, tested, manufactured, licensed, assembled, labeled, marketed, instructed for use, distributed and/or sold or otherwise placed into the stream of commerce by the Defendants:

- (i) Advantage System, including Advantage Fit System;
- (ii) Obtryx Transobturator Mid-Urethral Sling and Obtryx II;
- (iii) Lynx Suprapubic Mid-Urethral Sling System;
- (iv) Solyx Single Incision Sling (SIS) System;
- (v) Pinnacle Pelvic Floor Repair Kit, anterior/apical and posterior configuration; and
- (v) Uphold Vaginal Support System.

(b) all persons resident in Canada who by virtue of a personal relationship to one or more of such persons described in (a) above, have standing in this action pursuant to section 61(1) of the Family Law Act, RSO 1990, c F 3 or analogous provincial legislation or at common law.

[5] The Parties propose to amend the class period by amending the date limitation to include all persons implanted with a Boston Scientific Transvaginal Mesh Device on or before the date this Court grants an order amending the class definition. The proposed amended class definition is:

(a) All persons resident in Canada who have been implanted with a BSC Transvaginal Mesh Device at any time on or before the date of this Order (the "Primary Class");

(b) All persons resident in Canada who by virtue of a personal relationship to one or more such persons described in (a) above, having standing in this action pursuant to section 61(1) of the *Family Law Act*, RSO 1990, c F 3 or analogous provincial legislation or at common law (the "Family Class").

[6] Although these actions were certified on February 17, 2017, if approved, the proposed Settlement compensates women for damages alleged to be in any way related to implantation of a Boston Scientific Transvaginal Mesh Device in Canada to date.

[7] Although the proposed expansion of the class includes a longer time period, Class Counsel estimate that there are a small number of women who have been implanted with one or more of the Boston Scientific Transvaginal Mesh Devices after February 17, 2017. Class Counsel are aware of approximately 20 individuals who were implanted after the certification date with either POP or SUI devices. Boston Scientific sold very few of its Transvaginal Mesh Devices for the treatment of POP in Canada. As of July 26, 2019, Boston Scientific was no longer selling the POP devices, and unused stock was to be removed from the market. As such, the proposed expansion is not expected to materially increase the size of the class or the number of anticipated claims.

[8] Section 8(3) of the *Class Proceedings Act, 1992* confers a discretionary authority on this Court to amend a certification order, including changes to a class definition.<sup>3</sup> A certification order can be amended, including by redefinition of the certified class to respond to a change in circumstances. The expansion of a class will be approved where it is fair and necessary to do so.<sup>4</sup>

[9] The Settlement Agreement contemplates that all new Class Members will have the right to opt-out by completing and submitting an opt-out form no later than 60 days following the first publication of the Hearing Notice, all in accordance with Section 6 of the Settlement Agreement. The opt-out form is substantially identical to that approved in 2017 as is the 60-day opt-out period.

[10] The Parties have agreed on the form and content of a long and short form Notice of Settlement Approval Hearing as well as a Hearing Notice press release.

[11] The Parties have also agreed on a plan for disseminating the Hearing Notices. It is proposed that the long form Hearing Notice be disseminated as follows:

- a. sent by email or direct mail by Class Counsel to all Class Members or possible Class Members known to them, or to any person who requests it;
- b. posted by Class Counsel, in English and in French, on their websites; and
- c. sent by Boston Scientific directly to counsel for all plaintiffs involved in any individual actions against them regarding the same or similar allegations who have not previously opted-out of the Class.

[12] The short form Hearing Notice will also be published once in the following newspapers, in English or French, as appropriate for each newspaper, subject to each having reasonable publication deadlines and costs:

- a. The Globe and Mail, national edition;
- b. National Post, national edition;
- c. The Vancouver Sun (BC);
- d. Times Colonist (Victoria, BC);
- e. Courier (Kelowna, BC);
- f. The Edmonton Journal (AB);
- g. The Calgary Herald (AB);
- h. The Lethbridge Herald (AB);
- i. The Red Deer Advocate (AB);
- j. The Leader-Post (Regina, SK);
- k. The StarPhoenix (Saskatoon, SK);
- l. Winnipeg Free Press (MB);
- m. Toronto Star (ON);
- n. The Spectator (Hamilton, ON);
- o. Ottawa Citizen (ON);

<sup>3</sup> *Ludwig v 1099029 Ontario Limited*, 2007 ONCA 266; *Anderson v Wilson* (1999), 44 OR (3d) 673 (\*).

<sup>4</sup> *Fanshawe College v. LG Philips LCD Co. Ltd.*, 2016 ONSC 3958; *Irving Paper Ltd v. Atofina Chemicals Inc.*, 2015 ONSC 6662; *McSheffrey v. Ontario*, 2012 ONSC 6803

- p. Waterloo Region Record (ON);
- q. The Windsor Star (ON);
- r. The London Free Press (ON);
- s. Le Journal de Montreal (QC);
- t. The Gazette (Montreal, QC);
- u. Le Journal de Québec (QC);
- v. Le Nouvelliste (Trois-Rivieres, QC);
- w. Le Quotidien (QC);
- x. The Chronicle-Herald (Halifax, NS);
- y. The Guardian (Charlottetown, PEI);
- z. New Brunswick Telgraph Journal (NB);
- aa. The Times & Transcript (Moncton, NB); and
- bb. The Telegram (St. John's NL).

[13] The Notice Plan also provides for a digital notice campaign to be established by the Claims Administrator using banner advertisements directing potential Class Members to [www.canadabscmeshclassaction.com](http://www.canadabscmeshclassaction.com), where they will be able to obtain more information about the Settlement. The banner advertisements will be displayed on the following online news sources, in English and French as proportionate to the population:

- a. [theglobeandmail.com](http://theglobeandmail.com);
- b. [lapresse.ca](http://lapresse.ca);
- c. [neomedia.com/saguenay-lac-st-jean](http://neomedia.com/saguenay-lac-st-jean) (Le Réveil); and
- d. [lechodetroisrivieres.ca](http://lechodetroisrivieres.ca).

[14] All Notices will direct potential Class Members to the Settlement Website where they will be able to obtain more information about the Settlement Agreement, review the Settlement Agreement and related documents, download the Opt-Out Form, and, if the Settlement is approved, to access the claim forms and communicate with the Claims Administrator.

[15] The proposed notices meet the statutory criteria. The short form Hearing Notice is relatively brief and is designed to: (a) alert potential members included in the Expanded Class that their legal rights may be affected by the Certification Amendment Order; (b) advise potential members included in the Expanded Class of the opt-out procedure and deadline; and (c) advise all Class Members about the Settlement Approval Hearing and how to obtain more information about objecting to or attending the Settlement Approval Hearing, and/or learning more about the Settlement, and the options available to them.

[16] The long form Hearing Notice is comprehensive and is intended to provide members of the Class with more detailed information and instructions. The long form Hearing Notice contains the following information: (a) a detailed description of the proceeding, including the allegations and the causes of action asserted; (b) for those included in the Expanded Class, a description of the consequences of remaining in the class and a description of the opt-out procedure and 60-day deadline; and (c) how to obtain more information about the proposed Settlement, the Settlement Approval Hearing, and the options available to them.

[17] The proposed Notice Plan is based on a Notice Plan previously approved by this Court that is designed in a manner to achieve maximum reach across Canada. It provides that the Hearing

Notice will be disseminated on a national basis, through a number of channels, including direct mailings and both French and English newspapers, as well as web postings, e-mails, and bilingual press releases. The notice plan satisfies the requirements of the *Class Proceedings Act, 1992*.

[18] The Vesters' motion is granted.

A handwritten signature in cursive script, appearing to read "Perell, J.", written in black ink.

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Perell, J.

Released: February 28, 2020

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