COURT OF APPEAL FOR ONTARIO

CITATION: Taylor v. Canada (Attorney General), 2022 ONCA 892
DATE: 20221222
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Pepall, van Rensburg and Benotto JJ.A.

BETWEEN

Kathryn Anne Taylor

Plaintiff (Appellant)

and

The Attorney General of Canada

Defendant (Respondent)

Proceeding under the *Class Proceedings Act*, *1992*

John Legge, for the appellant

Sean Gaudet, Roger Flaim and Andrew Law, for the respondent

Paul-Erik Veel and Drew Black, for the Law Foundation of Ontario

James Newland and Brian Moher, for the respondent, Ontario Health Insurance Plan

Heard: December 12, 2022

On appeal from the judgment of Justice Thomas R. Lederer of the Superior Court of Justice, dated February 27, 2020, with reasons reported at 2020 ONSC 1192.

REASONS FOR DECISION

[1] The appellant is the representative plaintiff in a class proceeding relating to defective medical devices certified by order of the Superior Court: *Taylor v.*

Canada (Minister of Health) (2007), 285 D.L.R. (4th) 296. She appeals from the February 27, 2020 judgment dismissing her class action following a trial of the common issues.

[2] The case has had a regrettable history. The action was commenced in 1999 and came to trial more than 20 years later. Along the way, there were developments in the law and numerous attendances before this court, one of which was a stated case before a five-judge panel of this court in 2012: *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161.

[3] The class action concerned certain temporomandibular joint ("TMJ") implant devices made of a material known as Proplast manufactured by Vitek Inc. in the United States. The appellant claimed that the Canadian Government (and more particularly Health and Welfare Canada ("HWC")) owed a duty of care to members of the class to regulate and control the entry of those devices into Canada, and to warn of any dangers posed by those devices.

[4] We will first briefly address the regulatory scheme, followed by a discussion of the jurisprudential developments and the trial judge's key findings. We will then discuss the appellant's grounds of appeal and why the appeal should be dismissed.

[5] Finally, we will address the Attorney General of Canada's motion for leave to cross-appeal the order on costs. This also involves the issue of whether this court has jurisdiction to grant leave as against the Ontario Health Insurance Plan ("OHIP").

Background Facts

[6] The regulatory regime governing the implants in issue was set out in the *Food and Drugs Act*, R.S.C., 1985, c. F-27, and the *Medical Devices Regulations*, S.O.R./98-282.[1] The trial judge repeatedly emphasized that the scheme reflected a balance between two competing policy values: on the one hand a "desire to have those in the industry find, develop and produce devices that will assist those who are suffering and on the other to avoid causing more harm."

[7] A manufacturer of a new device was prohibited from selling or advertising a device in Canada unless it received a Notice of Compliance ("NOC") from HWC. To obtain a NOC, the manufacturer was required to submit evidence establishing the safety and efficacy of the new product and drafts of labels, package inserts, brochures and file cards. At para. 75, the trial judge noted that a NOC was not a statement that the product was safe, only that the work and tests necessary to justify entry had been completed; the legislation made clear that the responsibility

[1] Both the Act and the *Regulations* have since been amended.

to conduct proper studies lay with the manufacturer. Consistent with the balance underpinning the policy objectives sought to be achieved by the legislation, HWC was required to make a decision within 60 days of receipt of the materials from the applicant.

[8] Vitek first wrote to HWC requesting permission to import Proplast products into Canada in 1983 but was advised to submit an application for a NOC. On March 17, 1987, Vitek submitted an application for NOCs for a variety of devices. The application was rejected with a request for more detailed and better segregated information.

[9] In 1988, Vitek submitted an application consisting of 20 binders, seeking NOCs for 51 Proplast devices. HWC refused NOCs for TMJ implants on September 2, 1988 but did issue NOCs to Vitek for Preform Facial Implants and Facial Block and Sheeting on July 11, 1988.

[10] Significantly, the trial judge found that there was no evidence that any class member was ever implanted with facial Block or Sheeting in the temporomandibular joint and no evidence that any patient received such an implant after a Block or Sheeting was issued a NOC.

[11] As a result of a clerical error made by HWC, four Vitek devices were shown in HWC's internal database as having been issued NOCs when in fact no NOCs

had been issued for those devices. The error was repeated in HWC's Information Letter 765. The trial judge found that this letter was sent to manufacturers and distributors but there was no evidence that any doctor (or patient) relied on that letter and in reliance on it, had implanted a patient with any of those devices.

[12] Dr. Daniel Tomlak was the only surgeon who testified about implanting Proplast devices in patients in Canada. He relied on the reputation of the distributor, Instrumentarium Inc., in deciding to use the devices, rather than independently researching whether the devices had received NOCs. The representative plaintiff was implanted with a Proplast device, but it was not a Block or Sheeting device, nor was it one of the devices for which Vitek unsuccessfully applied for a NOC. Other class members also could not identify whether they had received a Block or Sheeting implant that had received a NOC.

[13] In March 1986, an HWC representative inspected Instrumentarium's warehouse but did not discover any Proplast TMJ devices. She reattended in 1989 and saw the four devices that had mistakenly been recorded as having received NOCs but due to the database entries, she did not consider them to be a problem.

[14] In the 1990-1991 time frame, the primary responsibility for a recall lay with the manufacturer. In March 1990, Vitek issued a safety alert to physicians with respect to certain Vitek implants (TMJ interpositional) but this did not include Block

or Sheeting. On learning of this safety alert, HWC sent an Information on Potential Recall to the Medical Devices Unit of HWC in the Central Region on May 17, 1990. On August 21, 1990, Instrumentarium issued a product recall. On August 21, 1990, the HWC representative visited Instrumentarium and was advised that each customer was being contacted and product retrieved. The recall was completed by October 3, 1990.

[15] HWC also contacted all physicians and dentists it knew to have used the product. It sent an advisory letter and package of relevant material to those physicians and dentists on October 26, 1994 and completed a seven-item action plan designed to prevent possible harm from use and distribution of the product by 1995. HWC could only identify 162 implants which may have been used in Canada.

Jurisprudence

[16] The action was certified in 2007 and after *Drady v. Canada (Health)*, 2008 ONCA 659, 300 D.L.R. (4th) 443 and *Attis v. Canada (Health)*, 2008 ONCA 660, 93 O.R. (3d) 35 were decided, the Attorney General moved to have it decertified. In *Drady* and in *Attis*, the court held that the legislative scheme did not demonstrate any intention to impose a private law duty of care. Moreover, there was no communication between HWC and these plaintiffs in those cases or any allegation of any representation by HWC to them.

[17] Ultimately a five-judge panel was established to hear a stated case. Doherty J.A., writing for the court, confirmed that there are two ways in which a government regulator may be sufficiently proximate to an individual to ground a private law duty of care. First, the legislative scheme can impose a private law duty of care on the regulator. If the legislative scheme imposes a private law duty, or if it either expressly or by implication forecloses such a duty, then the inquiry need not go any further. However, if the legislative scheme is not determinative one way or the other, the inquiry then turns to whether there have been sufficient interactions between the regulator and the plaintiff to justify the imposition of a duty of care: *Taylor*, at paras. 77-79.

[18] As *Attis* and *Drady* had already held that the legislative scheme applicable in this case did not establish a duty of care, Doherty J.A. determined that a duty of care could only be found based on interactions between HWC and class members: *Taylor*, at para. 102. The appellant alleged that HWC had made misrepresentations about the safety of the implants, and that these constituted interactions with class members which could give rise to a duty of care. In assessing these interactions, Doherty J.A. reasoned that “a regulator’s public statements acknowledging its public duties and obligations and its commitment to the performance of those duties, combined with reliance on those public statements by members of the public affected by the performance of those duties,

cannot, standing alone, create a relationship of proximity between individual plaintiffs and the regulator": *Taylor*, at para. 105.

[19] The pleadings alleged that HWC failed to correct its misrepresentations, despite knowing that the devices created a serious and ongoing risk to a clearly definable and relatively small group. Doherty J.A. found that it was arguable that the combination of misrepresentations and the failure to correct the record in the face of the risk to specific patients could create proximity: *Taylor*, at para. 111. The possible duty of care owed was therefore a narrow one.

Trial Judge's Reasons

[20] Before the trial judge, the Attorney General conceded that the harm from negligently regulating TMJ implants would be reasonably foreseeable. As such, the duty of care analysis turned on proximity. The trial judge followed the reasoning in *Attis, Drady,* and the five-judge panel decision and concluded that no duty of care was imposed by the legislation. He found that there were no direct communications between the plaintiff and HWC. The trial judge found that there was no *prima facie* duty of care, but if there were, he would have found that it was negated by residual policy considerations. He also decided that HWC's actions did not breach the standard of care.

Issues

[21] The appellant does not challenge the trial judge's duty of care analysis. Instead, she raises two grounds of appeal anchored on alleged palpable and overriding errors.

[22] First, she submits that the trial judge made a palpable and overriding error in finding that the government had not approved the Vitek "VK" type of Proplast TMJ prostheses.

[23] Originally, it had been the appellant's position that HWC had not issued NOCs for these devices. The appellant's position had been that HWC made misrepresentations about the safety of the devices by falsely stating that it had granted NOCs for the devices in an information letter and in its internal database. However, as noted by the trial judge, the appellant changed her position in her written closing submissions. She asserted for the first time that HWC had issued NOCs and had approved the devices, and that this was negligent. Accordingly, HWC had a positive obligation to control the risk created by the devices.

[24] Quite apart from any issue of unfairness associated with raising this theory so late in these protracted proceedings, there was considerable evidence to support the trial judge's finding that the devices in issue never received NOCs:

- testimony supported the conclusion that the internal database entries and the Information Letter showing NOCs for four Vitek devices reflected clerical errors;
- the July 7, 1988 letter to Vitek made it clear that HWC required more information before it could issue a NOC;
- the September 2, 1988, letter explaining why NOCs would not be granted;
- the NOCs that were sent that day did not include the devices the appellant claims; and
- no NOCs for the devices had ever been found by anyone.

[25] Moreover, the trial judge observed that there was no evidence that anyone had relied on the Information Letter listing the devices as having received NOCs. We see no palpable and overriding error in the trial judge's conclusion that HWC had not issued NOCs or approved the Vitek devices in issue.

[26] Secondly, the appellant submits that the trial judge erred in his assessment of the evidence relating to Proplast Block and Sheeting for which NOCs had been issued.

[27] This argument is readily addressed by two findings of the trial judge, both of which were supported by the evidentiary record. First, there was no evidence that

any member of the class was implanted with Block or Sheeting as a TMJ implant at any time after Vitek received a NOC. Second, there was no evidence that anyone was misled by the product monograph, which described the products, uses, and protocols governing the devices. Furthermore, the trial judge found that the monograph represented the manufacturer's guidance for physicians using the product and that the ultimate discretion on how and when to use the product rested with the physician based on an individual patient's needs. We would add that the trial judge's other findings relating to this issue were reasonable and available to him.

[28] For these reasons, the appeal is dismissed.

Cross-Appeal

[29] The Attorney General seeks leave to cross-appeal the costs award as against OHIP and the Law Foundation of Ontario. The Attorney General sought costs of the proceedings on a partial indemnity scale amounting to $6,306,388.79. Instead, the trial judge awarded $385,000, which represented costs of two senior counsel working 10 hours a day for the 55-day trial. He apportioned 10% of the costs to OHIP and the remainder to the Law Foundation of Ontario.

[30] As a preliminary matter, OHIP argues that this court does not have jurisdiction and that jurisdiction lies with the Divisional Court with leave. We disagree.

[31] The notice of cross-appeal included a request for leave to appeal costs. In addition, the appellant's appeal encompassed OHIP's subrogated claim. As such, the Attorney General's request for leave falls within r. 61.03.1(18). Contrary to OHIP's assertion, *Bryars Estate v. Toronto General Hospital* (1998) 38 O.R. (3d) 460, does not stand for the proposition that the Attorney General would be required to bring a separate leave application against OHIP. Irrespective of the quantum of the award against OHIP, the costs award that is the subject matter of the cross-appeal necessarily engages the award against OHIP.

[32] Turning to the merits of the costs appeal, the Attorney General advances three arguments. First it submits that the trial judge erred in finding that the case involved a matter of public interest. Second, it submits that the trial judge erred in considering the effect the costs award would have on the Class Proceedings Fund. Third, the Attorney General submits that the costs award was plainly wrong given the quantum.

[33] We do not give effect to these submissions.

[34] The concept of public interest should be construed liberally through the lens of the goals of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. It was open to the trial judge to determine that the public interest was engaged. Cases addressing liability for government regulation of consumer devices may be determined to be in the public interest. His decision in that regard is entitled to deference.

[35] The trial judge was properly alert to the public interest and the effect that costs would have on access to justice in class proceedings and considered the Fund in that context. Even absent consideration of the Fund, we are nonetheless satisfied that the costs award was fair and reasonable in the circumstances.

[36] The conduct of the proceedings was no doubt frustrating to the Attorney General and furthermore, the Attorney General was successful in the result. Even so, the trial judge was clearly of the view that both parties contributed to the extensive delay in the case and exercised his discretion accordingly. The trial judge spent 55 days of trial on this case and was alive and attentive to all the factors outlined in rule 57.01 of the *Rules of Civil Procedure* and s. 31 of the *Class Proceedings Act*. He wrote extremely extensive reasons for decision in which he considered the parties' positions thoroughly. There is a reason that, absent an error in principle or an award that is clearly wrong, deference is owed to the decision on costs made by a trial judge. Simply put, the trial judge is best positioned

to decide what is fair and reasonable in the circumstances. We see no reason to interfere with the costs awarded against either of the respondents.

[37] For these reasons, the appeal is dismissed, leave to cross-appeal the costs order is granted, but the cross-appeal is dismissed. If they have not reached an agreement on costs of the appeal and the cross-appeal, the parties are to make brief written submissions within 14 days of the date of the release of these reasons.

"S.E. Pepall J.A."
"K. van Rensburg J.A."
"M.L. Benotto J.A."