**CITATION:** Crisante v. DePuy Orthopaedics, 2021 ONSC 3703
**COURT FILE NO.:** CV-10-415755-CP
**DATE:** 20210521

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Joseph Charles Crisante, Katherine Crisante, Lynne Slotek and Larry Slotek / *Plaintiffs*

**AND:**

DePuy Orthopaedics Inc., DePuy International Limited, DePuy Inc. and Johnson & Johnson Inc. / *Defendants*

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

**BEFORE:** Justice Edward Belobaba

**COUNSEL:** *Megan McPhee, Colin Stevenson and Aris Gyamfi* for the Plaintiffs

*Gordon McKee and Robin Linley* for the Defendants

*Andrew Eckart of the Windsor Law Class Action Clinic* for certain objectors

**HEARD:** May 11, 2021 via Zoom video

## Settlement and Legal Fees Approval

[1] Eight years after certification[1] and just a few weeks before trial, this medical products class action involving metal-on-metal hip implants was settled for $15.5 million.

[2] The plaintiffs move for approval of the settlement amount, class counsels' legal fees and payment of honoraria to the lead representative plaintiffs. For the reasons that follow, all of the motions for approval are granted.

**Background**

[1] *Crisante v. DePuy Orthopaedics*, 2013 ONSC 5186.

[3] This class action was commenced in 2010 on behalf of a class of Canadian residents (other than those in BC and Quebec) who were implanted with the DePuy ASR™ XL Acetabular Hip System or the ASR™ Hip Resurfacing System (the "ASR Implants").

[4] The ASR Implants are metal-on-metal prosthetic hip implants which were approved for sale in Canada in late 2005 and early 2006 and recalled by the defendants in August 2010 after unpublished clinical data revealed higher than anticipated premature revision rates. The plaintiffs alleged that the ASR Implants were defective and that the defendants negligently designed the ASR Implants and failed to warn of their increased risks of early revision. The defendants denied all of these allegations.

**The plaintiffs**

[5] Joseph Charles Crisante lives in Ottawa with his wife Katherine. He is currently 82 years of age and was initially implanted with an ASR Implant on May 26, 2008 as a total replacement for his left hip.

[6] In early 2010, Mr. Crisante began noticing pain and clicking in his left hip. The pain affected Mr. Crisante's ability to walk certain distances, and to rise from a seated position. Upon the advice of his doctor, who warned of "the risk for catastrophic failure with uncontrolled fracture", Mr. Crisante underwent revision surgery on August 30, 2010 to explant and replace the ASR Implant. He has since largely recovered, although not to the same activity level that he enjoyed before the failure of his ASR Implant.

[7] Lynne Slotek lives in Toronto with her husband Larry. She is currently 74 years old and was initially implanted with an ASR Implant on August 29, 2008 as a total replacement for her left hip.

[8] In the summer of 2010, Mrs. Slotek began experiencing increasing pain and discomfort in her left hip which affected her ability to walk and get in and out of a car. By September 2010, the pain was such that Mrs. Slotek was forced to take sick leave from her job and go on short term disability. She underwent a revision surgery on December 17, 2010 to explant and replace the ASR Implant but her position with her employer was terminated before she could return to work. Like Mr. Crisante, Mrs. Slotek has largely recovered from her revision surgery but still has significant residual physical limitations as a result.

**The settlement agreement**

[9] The parties have settled the litigation for $15.5 million all-inclusive. The settlement was achieved just a few weeks before the start of the common issues trial that was scheduled to begin in February 2021.

[10] The terms of the settlement allow class counsel, subject to the approval of this court, to design and implement a claims protocol for the distribution of the settlement amount to class members. The relatively straight-forward claims protocol, as designed by class counsel, compensates class members who underwent premature revision surgery for general damages, extraordinary medical complications, loss of income and out of pocket expenses. In addition, eligible family class members will be compensated for their derivative claims.

[11] The eligibility criteria are modelled after the court-approved settlements in the parallel Quebec proceeding *Dick c. Johnson et. Johnson Inc*., Court File No. 500-06-00550-109] ("Québec Action") and B.C. proceeding *Wilson v. DePuy International Ltd.,* Court File No. VLC-S-S-116652 ("BC Action"). They are intended to cover class members who have suffered actual injury as a result of the ASR Implant.

[12] The requirement that a revision occur, or be recommended, within eleven years of implant is based on the principle that all prosthetic hip implants come with a limited lifespan that would eventually necessitate revision regardless of defect. The 11-year cut-off (which would end on August 24, 2021 for claimants who were implanted with an ASR Implant just before the recall on August 24, 2010) was set by class counsel and is intended to cover those who experienced premature revision. The 11-year cut-off is supported by recent medical studies and is identical to the cut-off in the Quebec settlement and one year longer than the cut-off in the BC settlement.

[13] Revisions of ASR Implants within six months of the initial ASR surgery are excluded because such revisions typically are unrelated to any defect of the ASR Implant and are instead attributable to surgical complications such as infection. In this case, class counsel have provided a waiver mechanism in the claims protocol to allow for the possibility that a revision occurring within that time period might not necessarily be a result of infection. If the revision is attributable to the ASR Implant itself, the affected class member will be eligible for compensation under the settlement.

[14] Additional exclusions regarding revisions of an ASR Implant due to trauma or fracture of the femoral neck (which is unrelated to the alleged defects of the ASR Implants claimed in this action) are consistent with similar exclusions in the Quebec and BC settlements.

[15] The second category of class members eligible to claim under the settlement are "approved medically precluded claimants". These are individuals who needed a single or bilateral revision surgery with 11 years of their initial ASR surgery, but were precluded from doing so because of a medical reason (such as a heart or other condition that would have made the revision surgery too risky).

[16] The third category, "approved family claimants", includes the approved claimant's spouse, child, grandchild, parent, grandparent, brother, or sister. These family members are entitled to assert a derivative claim under s.61 of the *Family Law Act*[2] and, for reasons of fairness and efficiency, are extended to claimants from provinces outside of Ontario.

[17] Based on available ASR sales data, as supplemented by hospital-based revision data (all of which is fully detailed in the record before the court), class counsel estimate that the number of potential ASR claimants herein will likely be somewhere between 86 and 103. Taking the midpoint of that range, adding a few individuals who may have been recommended a revision

---

[2] R.S.O. 1990, c. F. 3.

surgery within the 11 years of implant but were medically precluded or have not yet undergone the surgery, and then applying a reasonable 95% take-up rate would yield approximately 91 revised claimants who are expected to file successful claims.

[18] Assuming 91 ASR Claimants (81 single, 10 bilateral), class counsel compiled this chart setting out the anticipated compensation for each category and how this settlement (the *Crisante* settlement) compares to the BC settlement:

| **Assumptions** | **BC terms** | ***Crisante* Settlement** |
|---|---|---|
| 81 single revisions<br>10 bilateral revisions | $9,300,000<br>(81 x $100,000/single<br>10 x $120,000/bilateral) | **$11,170,000**<br>(81 x $120,000/single<br>10 x $145,000/bilateral) |
| 91 derivative claims (loss of care, guidance, companionship for family) | $455,000<br>(91 X $5,000) | **$637,000**<br>(91 X $7,000) |
| 8 single extraordinary injury<br>1bilateral extraordinary injury | $360,000<br>(9 x $40,000/claimant) | **$560,000**<br>8 x $60,000 extra/single<br>1 x $80,000 extra/bilateral |
| 30 claimants with maximum loss of income | $210,000 | **$600,000**<br>30 X $20,000 |
| 91 claimants with out-of-pocket expenses | $0 | **$227,500**<br>(91 X $2,500) |
| Provincial health insurer claims outside province | N/A | **$250,000** |
| Notice and claims administration Costs | N/A (paid by defendants separately) | **$200,000**<br>(estimated) |
| Disbursements | $50,000 | **$1,147,830** |
| Honoraria | | **$20,000** (if approved) |

| | | |
|---|---|---|
| **Total** | **$10,375,000** | **$14,812,330** |
| | Potential residue (to be re-allocated to injuries compensation for approved ASR claimants | **$687,670** |
| | **Total Lump Sum** | **$15,500,000** |

[19] As class counsel explain, if 91 ASR claimants and 91 family law claimants submit claims that are approved, the net settlement fund will be sufficient to provide a gross base compensation amount of $120,000 per single revision and $145,000 per bilateral revision and $7,000 per family claim. If more than 91 ASR Claimants come forward, as seen in the above chart, there will still be almost $700,000 in residue that could be allocated in their favour.

[20] Any residue will be reallocated towards the approved ASR claimants and potentially increase their base gross compensation entitlements to more than $120,000 per single revision and $145,000 per bilateral revision.

[21] Assuming the 91-claimant take-up, the base gross compensation awards will be significantly higher than the corresponding amounts in the BC Settlement which are not only lower ($100,000 gross/single revision and $120,000 gross/bilateral revision) but also subject to significant deductions (up to a 32 per cent reduction if the revision occurred nine years after implant, and up to an additional 15 per cent reduction if the claimant's age at the initial surgery was 85 or older). These reductions do not exist here.

[22] The $15.5 million settlement also compares favorably with the Quebec settlement, which was a $20 million lump sum settlement reached on the eve of trial. Counsel in that proceeding estimated that eligible class members would receive a net award ranging from $73,000 for a single revision to $184,000 for a single or bilateral revision with an extraordinary medical complication.

[23] Finally, the estimated amounts under the proposed settlement also exceed the compensation levels that were judicially approved in the settlements of other hip implant class actions, such as the *Stryker Rejuvenate* settlement, the *Wright Profemur* settlement, and the *Zimmer Durom* settlement.[3]

[24] I have no difficult concluding that the proposed settlement is well within the zone of reasonableness.

---

[3] *McSherry v. Zimmer GmbH*, 2016 ONSC 2606.

[25] Fewer than 10 class members filed objections (about the same number as filed letters of support). Some of the objectors were ably represented by the Windsor Law School Class Action Clinic.[4] Others made submissions at the hearing. The bulk of the objections were answered or resolved by class counsel during the course of the hearing. The primary objection — that "unrevised" class members will receive no compensation under this settlement — was addressed in some detail by class counsel. Class counsel said this:

- The essence of the claim, as set out in the pleadings and reflected in the certified common issues, has always been whether the ASR Implants were defective in the sense that they posed a materially increased risk of premature revision surgery. It is these individuals, who experienced an actual failure of their ASR Implant, who most stood to benefit from the advancement of this action and the determination of the certified common issues at trial and who should now be entitled to compensation.
- Class Members who were implanted with an ASR Implant but were never recommended to undergo premature revision surgery received the benefit of their ASR Implant as per its intended use and likely did not sustain any actual physical injuries. Furthermore, with respect to medical monitoring after the recall, they had access to the Crawford program, which provided reimbursement for reasonable out of pocket expenses associated with additional testing prompted by the recall. Had they sought to advance individual lawsuits, they would likely not have been successful unless they were able to demonstrate physical injury. Canadian law does not permit damages for emotional distress or "nervous shock" caused by a defendant's negligence in the absence of physical harm.[5]
- Apart from the Quebec settlement, in which class counsel elected to award a nominal $2,500 amount to each unrevised claimant, none of the other ASR Implant settlements in Canada or around the world have provided compensation to unrevised claimants, unless (like here), the claimant was medically precluded from undergoing a revision surgery they otherwise required.
- When faced with a similar objection in the settlement approval hearing in Australia, the Federal Court found "there was nothing arbitrary or unfair about the eligibility criteria", which was supported, to an extent, "by common sense and reason."[6] The Court held that it "would be somewhat unfair to group members who had undergone significant surgery to replace a non-performing ASR implant if group members who had not, and did not need, revision surgery within 13 years were nevertheless able to obtain an award of compensation." The Court went further to note that the eligibility

[4] As I said to Mr. Eckart during the hearing, this is exactly the kind of work that the Class Action Clinic should be doing. I support and encourage the Clinic's involvement in any class action matter where, like here, they believe they can make a valuable contribution.

[5] *Mustapha v. Culligan of Canada Ltd.,* 2008 SCC 27.

[6] *Stanford v. DePuy International Ltd. (No. 6)*, [2016] FCA 1452, at para. 138.

criteria "distinguished appropriately, and not arbitrarily, between group members who had a reasonable hope and expectation of establishing compensable damages in these proceedings, as against those who did not".[7]

- Finally, as a practical matter, given that the ASR Implants were recalled in 2010, and that DePuy's August 24, 2010 letter to physicians noted the importance of ion testing, in all likelihood a class member's physician would have recommended a revision by now had the metal ion levels reached a level that were concerning to the physician. In such a case, the class member would be eligible to claim under the proposed Settlement. Further, while it was not certified as a common issue to be determined at trial, the defendants have provided expert evidence that the long-term systemic impacts of metal ion exposure remain unknown, and that there have been studies that suggest there is no increased cancer risk for metal-on-metal patients.

[26] After being further pressed by counsel for the objectors and by the court, class counsel, to their credit, agreed to give this matter further thought.

[27] I am pleased to report that several days after the hearing concluded, class counsel advised the court that the compensation protocol would be revised slightly to provide some measure of compensation for "unrevised" claimants.

[28] The revised claims protocol will reallocate a portion of the family law compensation fund to a new category, "psychological injury compensation", that will be made available exclusively to *unrevised* ASR implant class members, who suffer "serious and prolonged" psychological distress relating to the fear of metallosis (metal poisoning) or other related health risks that may arise from the unrevised ASR implant.

[29] Such "unrevised" individuals may be eligible to claim up to $5,000 gross ($3,305 net after deduction of class counsel fees and tax). Any amount remaining in the psychological injury compensation fund would revert back to the family law compensation fund, to be allocated as originally intended, up to the original $7,000 gross cap on individual family claim awards. Any shortfall would be treated like shortfalls in the other categories with individual awards reduced proportionately. If there is no residue from the psychological injury compensation fund, the amount that is remaining in the family law compensation category would still be enough to compensate the expected 91 family claimants at $5,000 gross ($3,305 net). This would be equivalent to the amount that was provided under the BC Settlement.

[30] This was not an "early stage" settlement. Unlike in most class actions, here discoveries were concluded and the settlement was reached (after two unsuccessful mediations) just a few weeks before the start of the trial. Short of actually completing the trial, the plaintiffs could not

---

[7] *Ibid.,* at paras. 138 – 139.

have been in a more informed position to understand the strengths and weaknesses of their case and the reasonableness of the proposed settlement.

[31] In any event, as class counsel explain, this is not a case where the damage awards potentially attainable at trial would have offset the risks of proceeding with the litigation. Class counsel estimate that this settlement will provide class members with compensation that is comparable to what would probably have been awarded at individual trials. General damage awards for premature hip revision surgery in Canada have ranged from approximately $50,000 to $156,000 when adjusted for inflation.[8] As such, the late-stage, risk-reward analysis in this case was hyper-informed and weighed heavily in favor of the settlement.

[32] For all the reasons set out above, the proposed $15.5 million settlement is approved. In my view, it is fair and reasonable and in the best interests of the class. Class counsel are right to believe that the settlement is comparable, if not superior, to settlements achieved in other jurisdictions. I note, as an aside, that this settlement resolves the last remaining action in this world-wide ASR litigation.

**Legal fees**

[33] Class counsel are seeking approval of legal fees in the amount of $4,520,117 (plus HST) representing 30% of the $15.5 million settlement less the fee portion allocated in the certification costs award.[9]

[34] I note that over the course of this 11-year litigation the contingency fee amount requested by class counsel is less than the actual time incurred.

[35] In any event, based on the retainer agreement, class counsel are entitled to the agreed-to 30 per cent contingency fee plus disbursements and taxes. As discussed in *Cannon*,[10] and as further refined in *Brown*,[11] this contingency fee amount is presumptively valid on the facts herein and is approved.

---

[8] See, for example, *Mills v. Moberg*, [1996] B.C.J. No. 1930 (B.C.S.C.); *McGregor v. Crossland*, [1996] O.J. No. 3593 (Ont. S.C.J.) at para. 200; *Bertulis v. Gordon*, [1995] B.C.J. No. 2530 (B.C.C.A.) at para. 63; *Sinden v, Day*, [1992] B.C.J. No. 909 (B.C.S.C.) at para. 53.

[9] At certification, the plaintiffs were awarded an all-inclusive amount of $175,000. Of that, the plaintiffs reimbursed the Class Proceedings Fund $28,232.61. The remaining $146,767.39 was treated as fees inclusive of tax or $129,882.65 in net fees. 30 per cent of $15.5 million is equal to $4,650,000. Subtracting from this the $129,882.65 received from certification yields the final requested figure of $4,520,117.35 plus HST.

[10] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

[11] *Brown v. Canada (Attorney General)*, 2018 ONSC 3429.

[36] Class counsel are also seeking approval for the payment of $1,147,830.01, inclusive of applicable taxes, for their disbursements, from which $1,079,030.66 will be repaid to the Class Proceedings Fund.[12]

**Honoraria to Joseph Crisante and Lynne Slotek**

[37] Class counsel also seek court approval of an honorarium of $10,000 each to the lead representative plaintiffs Joseph Crisante and Lynne Slotek in recognition of their efforts over some 11 years of litigation. No additional honorarium request is being submitted for their respective spouses, Katherine Crisante and Larry Slotek, who also served as plaintiffs and represented the family class.

[38] As a rule, representative plaintiffs do not receive additional compensation for simply doing their job as class representatives.[13] Here, however, I am persuaded that the requested honoraria are well deserved.

[39] Mr. Crisante and Mrs. Slotek's contribution as representative plaintiffs was not only extensive and impressive, they did the work required while dealing with significant implant-related pain and discomfort. Mr. Crisante, who is 82 years old, travelled frequently from Ottawa to Toronto (accompanied by his daughter) to be cross-examined on his affidavits or otherwise consult with counsel. Mrs. Slotek, who is 74 and lives in Toronto and was awaiting revision surgery, managed to attend key meetings, including one before the Class Proceedings Fund.

[40] Both of them did an excellent job as representative plaintiffs over a long period of time — almost 11 years of litigation — while enduring significant pain, discomfort and inconvenience because of the very medical product that was driving their lawsuit. Both of them, as the lead representative plaintiffs, also agreed to provide and be cross-examined on highly personal medical and employment records.

[41] I am therefore persuaded on this evidence that the requested honoraria are justified.

**Disposition**

[42] The proposed settlement is approved. As are class counsels' legal fees and disbursements.

[43] This court also approves the appointment of RicePoint as claims administrator, the proposed notice of settlement and the settlement notice plan, the related notice expenses and the payment of the requested honoraria.

[44] Orders to go accordingly.

---

[12] As required under Ont. Reg. 771/92, s. 10(3)(a).

[13] *Aps v. Flight Centre Travel Group,* 2020 ONSC 6779, at para. 43; *Casseres v Takeda Pharmaceutical Company,* 2021 ONSC 2846 at para. 10.

[45] I commend counsel on both sides on their good work and on the outcome achieved.

**Signed:** *Justice Edward P. Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective from the date it is made, and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal Judgment [Order] need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Judgment [Order] may nonetheless submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

**Date:** May 21, 2021