

SUPERIOR COURT
(Class Actions)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000966-198

DATE: June 27, 2019

BY THE HONOURABLE CHANTAL TREMBLAY, J.S.C.

KAREN BASAL

Applicant

v.

ALLERGAN PLC

and

ALLERGAN INC.

and

ALLERGAN USA INC.

and

MENTOR WORLDWIDE LLC

and

JOHNSON & JOHNSON INC.

and

IDEAL IMPLANT INCORPORATED

and

CLARION MEDICAL TECHNOLOGIES

Defendants

JUDGMENT ON LEAVE TO EXAMINE THE APPLICANT AND TO FORCE THE
COMMUNICATION OF MEDICAL RECORDS

[1] The Applicant filed an Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff (**Authorization Application**) against the Defendants on behalf of the following proposed Class:

All consumers in Canada (alternatively in Québec) who have received textured surface breast implants manufactured, marketed or sold by Allergan Inc., Inamed Corporation, Mentor Worldwide LLC or Ideal Implant Inc.

[2] She alleges that these textured surface breast implants present a risk of rupturing and causing cancer since they are linked to a rare type of cancer known as anaplastic large cell lymphoma or BIA-ALCL. Furthermore, she claims that the Defendants participated in the sale of defective implants and failed to mention the safety and health risks associated with these implants in representations made to class members.

[3] As a result, the Applicant alleges that class members are justified in claiming compensatory and moral damages due to the “physical and mental dangers” caused by the textured surface breast implants, as well as punitive damages under the *Consumer Protection Act*¹ and the *Charter of Human Rights and Freedoms*.²

[4] The Defendants Allergan PLC, Allergan Inc. and Allergan USA Inc. (collectively “**Allergan**”) seek the communication of the Applicant’s medical records as well as the Court’s authorization to examine her.

[5] The Defendants Mentor Worldwide LLC and Johnson & Johnson (collectively “**Mentor and J&J**”) subscribe to these requests and also wish to be authorized to examine the Applicant.

[6] These requests are contested by the Applicant.

[7] The parties submitted detailed written arguments in support of their respective positions regarding these preliminary issues. At the Court’s suggestion, the parties all agreed not to hold a hearing on such issues given their detailed written submissions.

1. ANALYSIS

[8] In analyzing these preliminary issues, the Court must determine whether the requested information is relevant and essential for the authorization hearing in light of the criteria provided for in article 575 CCP.

[9] With regard to her personal situation, the Applicant alleges the following:

- a) On May 13, 2016, she consulted a plastic surgeon who recommended the Natrelle cohesive silicone gel-filled textured breast implants sold by Allergan (hereafter referred to as **Natrelle implants**);
- b) She was reassured by the fact the Natrelle implants were marketed as safe and appeared to have virtually no health risks, notably in reference to a brochure communicated as Exhibit P-5 which has been distributed to Class members since 2008;
- c) On September 15, 2016, she underwent the breast implant surgery (hereafter referred to as the **Surgery**);

¹ CQLR, c. P-40.1.

² CQLR, c. C-12.

- d) Up until November 2018, she was satisfied with her surgery, until she came across several articles discussing “the serious health risks associated to textured breast implants and found out about the recall and ban of textured breast implants in France and Europe”;
- e) Reading these articles caused her to suffer “a great deal of stress”;
- f) She is aware of a least two other class members with Natrelle implants which have ruptured and is “extremely worried, stressed and concerned”;
- g) She herself is worried that one of her Natrelle implants may have ruptured;
- h) She asked her plastic surgeon to remove and replace her Natrelle implants with another type of implant but was informed that it was not possible to do so free of charge;
- i) Allergan failed in its legal obligations to inform her of the serious health risks and dangers associated with textured breast implants;
- j) Had she been informed and aware of the health risks and dangers associated with Natrelle implants, she would have never accepted having this type of implant and would have never purchased textured implants at any price;
- k) In addition to pecuniary losses, the situation has caused her a lot of stress, inconvenience, frustration and loss of time from work, as well as moral and punitive damages, totalling \$57,650.00.

[10] Allergan, Mentor and J&J request that the Applicant communicate the following:

- a) All of her relevant medical, pharmaceutical and consultation records with respect to health care and treatment received from all hospitals, pharmacies or other health-related establishments and all health care professionals in relation to the Surgery as well as any follow-up medical treatment related to or resulting from such Surgery.
- b) All medical records relating to all consultations and/or treatment with a psychologist, a psychiatrist, or other similar health professional after the Surgery as well as all such records for a period of five years prior to the Surgery, specifically with regard to stress.

[11] Allergan, Mentor and J&J also seek leave to examine the Applicant on the following topics:

- a) The circumstances surrounding the Applicant’s consultation of or exposure to any information, marketing materials, advertisements or any other representations from the Defendants, and specifically Allergan, prior to the Surgery, including her consultations with the unnamed plastic surgeon and any information, marketing materials, documents or advice that was provided to her by the plastic surgeon prior to the Surgery regarding textured breast implants, and specifically the Natrelle implants, as well as the Applicant’s

- consultation or exposure to information, news articles, warnings, reports or advice prior to the Surgery regarding textured breast implants;
- b) The circumstances regarding the Applicant's allegation that she is aware of a least two other class members whose textured breast implants' ruptured causing her stress;
 - c) The details and circumstances surrounding the Surgery itself, and specifically the Natrelle implants;
 - d) The factual basis for and details regarding the allegation that one of her breast implants may have ruptured;
 - e) The circumstances and any details regarding any follow-up consultations with any physician or any other mental health professional with regard to her Surgery and any incident or symptoms that she may have experienced following the Surgery;
 - f) The allegation that the Applicant suffered stress as a result of reading the article communicated as Exhibit P-11 and other related articles and information (par. 45 of the Authorization Application) and the factual basis for and details regarding the allegation that textured breast implants cause "physical and mental dangers" (par. 65 of the Authorization Application);
 - g) The Applicant's allegation that she has suffered ascertainable and compensable loss and damages, including trouble and inconvenience and moral damages as a result of the alleged safety defects or risks of the textured breast implants and omissions by Defendants in relation to the textured breast implants;
 - h) The description and composition of the proposed class, the identification of the implants and the Defendants covered by the proposed class action;
 - i) The facts regarding the Applicant's ability to properly represent the members of the proposed class, including the nature of the steps taken by her leading up to and culminating in the filing of the Authorization Application, as well as her efforts, if any, to identify other members of the proposed class (par. 95 (b) of the Authorization Application).

[12] The applicant's examination can be authorized when it is relevant and useful to help the court determine whether the applicant has an arguable case justifying the relief sought pursuant to article 575(2) CCP³.

[13] Recently, in *Letarte v. Bayer*⁴, this court authorized the examination of the applicant on her allegations of health issues caused by contraceptive implants and the nature of the representations made to her about the risks and the safety of the implants

³ *Asselin v. Desjardins Cabinet de services financiers Inc.*, 2017 QCCA 1673 (leave to appeal to SCC requested, 37898 (2017-12-28))

⁴ 2018 QCCS 873, par. 9-12 and 21-23.

as this information was useful to enable the court to determine whether the applicant had an arguable personal cause of action:

[9] Dans le cadre d'un recours en dommages intenté contre une compagnie pharmaceutique en raison des effets secondaires nocifs pour la santé d'un produit fabriqué ou distribué par celle-ci, le demandeur doit démontrer *prima facie* qu'il a une cause d'action personnelle défendable. Il doit démontrer l'apparence d'une faute (effets secondaires nocifs pour la santé non divulgués), d'un préjudice (problèmes de santé) et d'un lien de connexité entre les deux, soit que les problèmes de santé du demandeur sont causés par l'utilisation du produit .

[10] La jurisprudence a déjà reconnu que dans ce type de recours les dossiers médicaux du demandeur, la déclaration sous serment d'un médecin ayant examiné ceux-ci et l'interrogatoire du demandeur sur les problèmes de santé allégués peuvent être utiles afin de permettre au Tribunal de se prononcer notamment sur l'apparence du lien de connexité .

[...]

[11] Mme Letarte ne dépose aucun dossier médical ou expertise afin de supporter le préjudice qu'elle allègue.

[12] Afin de pouvoir déterminer à l'étape de l'autorisation si Mme Letarte a personnellement une cause défendable et de pouvoir apprécier l'argument de Bayer voulant que Mme Letarte ne démontre pas *prima facie* de lien de causalité entre son préjudice et la faute alléguée de Bayer, le Tribunal estime nécessaire de prendre connaissance des dossiers médicaux de Mme Letarte. La situation médicale de Mme Letarte est pertinente

[...]

[21] Bayer demande d'interroger Mme Letarte sur les sujets suivants afin de permettre au Tribunal de déterminer si les critères de l'article 575 al. 2, 3 et 4 C.p.c. sont satisfaits :

- son état de santé et si les troubles allégués résultent de causes étrangères à l'installation des implants Essure;
- les représentations eu égard aux risques et bénéfices des implants Essure sur lesquelles Mme Letarte aurait basé sa décision d'accepter que ces implants soient installés;
- l'existence même du groupe proposé, les démarches entreprises par Mme Letarte, sa capacité à agir à titre de représentante.

[22] Pour les mêmes raisons que celles énoncées précédemment, l'interrogatoire sur l'état de santé de Mme Letarte est nécessaire afin que le Tribunal puisse évaluer, lors de l'autorisation, si sa cause est défendable.

[23] Il en est de même pour l'interrogatoire portant sur les informations qu'elle aurait reçues de Bayer quant à Essure .

[14] The Court is of the view that the Applicant's medical records, described in paragraph 10 (a) above, are relevant and essential in order to determine whether the Applicant has an arguable personal cause of action.

[15] Indeed, the Authorization Application only presents a partial and incomplete description of the factual context surrounding the Applicant's particular situation, notably with regard to the information obtained from her plastic surgeon or from other sources prior to the Surgery concerning the risks associated with the Natrelle implants, the Surgery itself and the evolution following the Surgery.

[16] As for the requested medical records concerning the Applicant's mental health, described in paragraph 10 (b) above, the Court is of the view that the allegations contained in the Authorization Application are sufficient to assess the criteria provided for in article 575 CCP. Such request constitutes a pre-enquiry on the merits of the case and will not be allowed at this point in time.

[17] Furthermore, the Court is of the view that Allergan, Mentor and J&J have demonstrated the usefulness and necessity to examine the Applicant on the topics described in paragraph 11 (a), (c) and (d) above. The same reasoning applies as to the communication of the medical records.

[18] However, they have not demonstrated the usefulness or necessity of examining the Applicant on the topics described in paragraph 11 (b), (e), (f), (g), (h) and (i) above.

[19] Indeed, the Court does not see the usefulness of the topic (e) since the Applicant does not allege having consulted any mental health professional with regard to her Surgery or having experienced any incident or symptoms following the Surgery.

[20] As for topics (f) and (g), the Court is of the view that the allegations contained in paragraphs 34 to 65 of the Authorization Application are sufficient. As mentioned by Justice Bisson in *Li c. Equifax*⁵, if the allegations pertaining to the damages are insufficient, incomplete, not supported by evidence or composed of arguments rather than facts, the Court does not see why the Defendants would want to examine the Applicant to allow her to improve the allegations or to add new evidence. It would not be in Defendants' interest to do so.

[21] As for topics (b), (h) and (i), the Court is of the opinion that the allegations contained in the Authorization Application concerning the class composition and the representation of the class members, are sufficient. The requested discovery on these topics is not essential or indispensable to assess the criteria set forth in article 575 (3) and (4) CCP.

[22] Indeed, as stated by the Court of Appeal in *Lévesque v. Vidéotron*⁶:

[27] Toutefois, le niveau de recherche que doit effectuer un requérant dépend essentiellement de la nature du recours qu'il entend entreprendre et de ses caractéristiques. Si, de toute évidence, il y a un nombre important de consommateurs qui

⁵ 2018 QCCS 1892 (motion for leave to appeal denied, 2018 QCCA 1560), (leave to appeal to SCC denied, 38411 (2019-03-21))

⁶ 2015 QCCA 205.

se retrouvent dans une situation identique, il devient moins utile de tenter de les identifier. Il est alors permis de tirer certaines inférences de la situation.

2. CONCLUSIONS

[23] The Court is of the view that Defendants' requests are too broad.

[24] They can contest the Authorization Application without assessing the Applicant's credibility on all aspects of the Authorization Application which would be inappropriate at this stage.

[25] Therefore, the Court grants in part Defendants' request to obtain the Applicant's medical records and to examine her.

WHEREFORE, THE COURT:

[26] **GRANTS** in part the *Application for Communication of Medical Records and for Authorization to Examine the Applicant Karen Basal*;

[27] **ORDERS** Karen Basal to communicate to Allergan Inc., Allergan USA Inc., Allergan PLC, Mentor Worldwide LLC and Johnson & Johnson Inc., within thirty (30) days of the present judgment, the following medical records:

- a) All of her medical, pharmaceutical and consultation records with respect to health care and treatment received from all hospitals, pharmacies or other health-related establishments and all health care professionals in relation to the surgery she underwent on September 15, 2016, as well as any follow-up medical treatment related to or resulting from such surgery.

[28] **AUTHORIZES** Allergan Inc., Allergan USA Inc., Allergan PLC, Mentor Worldwide LLC and Johnson & Johnson Inc. to examine Karen Basal, at a date to be determined within 30 days of the communication of the above-mentioned medical records, for a maximum of two hours and regarding the following topics:

- a) The circumstances surrounding Karen Basal's consultation of or exposure to any information, marketing materials, advertisements or any other representations from the Defendants, and specifically Allergan, prior to the surgery she underwent on September 15, 2016, including her consultations with the unnamed plastic surgeon and any information, marketing materials, documents or advice that was provided to her by the plastic surgeon prior to the surgery regarding textured breast implants, and specifically the Natrelle implants, as well as Karen Basal's consultation or exposure to information, news articles, warnings, reports or advice prior to the surgery regarding textured breast implants;
- b) (...)
- c) The details and circumstances surrounding the surgery itself, and specifically the Natrelle implants;

- d) The factual basis for and details regarding the allegation that one of her breast implants may have ruptured;
- e) (...)
- f) (...)
- g) (...)
- h) (...)
- i) (...)

[29] **THE WHOLE**, with legal costs.


CHANTAL TREMBLAY, J.S.C.

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