

CITATION: Kibalian v Allergan Inc., 2022 ONSC 1827
COURT FILE NO.: CV-19-00620507-00CP
DATE: 20220323

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Takwihin Kibalian and Yeghia Kibalian, Plaintiffs

– **AND** –

Allergan PLC, Allergan Limited, Allergan, Inc., Allergan USA, Inc. and Allergan Inc., Defendants

BEFORE: E.M. Morgan J.

COUNSEL: *Vincent Genova, Annelis Thorsen-Cavers, Daniel Uribe, Kate Cahill, and Anthony Leoni*, for the Plaintiffs

Peter Pliszka and Mitchell Stephenson, for the Defendants

HEARD: March 23, 2022

PLEADING AMENDMENT AND PARTIAL CERTIFICATION

[1] As part of a restructuring of this proposed class action as a national class action, the Plaintiffs have moved to amend the Statement of Claim.

[2] Among other things, the amendment will add as representative Plaintiff a Plaintiff from the parallel Quebec and British Columbia actions so that the Ontario action can incorporate those parts of the class. Counsel for the Defendants indicates that there is no objection to the pleading amendments or the addition of new Plaintiffs.

[3] There is also some reorganization and some changes to be made to the Statement of Claim itself. The Defendants have not yet pleaded, and so the Plaintiffs can otherwise amend their pleading as of right.

[4] Counsel for the Plaintiffs advises that the parties have managed to negotiate a partial certification of this action such that a limited number of common issues can be identified and certified here.

[5] Counsel for the Defendants confirms that this is the case, but he specifies that the consent is only on behalf of the Defendant, Allergan Inc. The other Defendants take no position here, but will be objecting to certification at large when the balance of the issues come up in the certification hearing now scheduled for this coming September. There is apparently also a jurisdictional

objection by the other Defendants, and they specifically are reserving their rights to raise that as well.

[6] The Plaintiffs and Allergan Inc. have agreed to certification of the proceeding as against Allergan Inc. with respect to the following class (the “Primary Class Members”):

(a) All persons who, between May 31, 1999, and May 29, 2019, were implanted in Canada with one or more BIOCELL textured breast implants supplied by Allergan Inc. and enumerated in as follows:

Natrelle Saline-Filled Breast Implants (Textured); Natrelle 410 Truform Silicone-Filled Breast Implants, Natrelle Silicone-Filled Breast Implants (Biocell Round), Natrelle Inspira Truform 1 (Responsive) Breast Implants (Textured Shell), and Natrelle Inspira Truform 2 (SoftTouch) Breast Implants (Textured Shell).

and

(b) All persons who, by virtue of a personal relationship with one or more Primary Class Member, have standing to claim damages pursuant to section 61(1) of the *Family Law Act*, RSO 1990, c. f.3, as amended, or analogous provincial legislation (the “Family Class Members”).

[7] The Plaintiff and Allergan Inc. have also agreed that the following common issues be certified:

- (1) Are any of the Textured Breast Implants defective in that they have the propensity to cause breast implant-associated anaplastic large cell lymphoma (“BIA-ALCL”)?
- (2) Did Allergan Inc. have a duty to warn the Plaintiffs and Class Members of a risk of developing BIA-ALCL in relation to any of the Textured Breast Implants?
- (3) If so, when did that duty arise, did the content of the duty change over time between 1999 and 2019, and if so, how did it change?
- (4) Did Allergan Inc. fulfil that duty at the applicable times?
- (5) Did Allergan Inc.’s sale of the Textured Breast Implants breach any of the provincial Consumer Protection Acts, and if so, when and how?
- (6) Does Allergan Inc.’s conduct warrant an award of punitive damages?

[8] The Amended Claim discloses sufficient causes of action against Allergan Inc. for the purposes of section 5(1)(a) of the *Class Proceedings Act, 1992*, SO 1992, c. 6 (“CPA”).

[9] In short, the Plaintiffs allege that certain of the Allergan Breast Implants cause breast cancer-related symptoms known as BIA-ALCL, and are prone to premature rupture. The Plaintiffs

also allege that there are causal relationships between all of the silicone gel-filled Allergan Breast Implants and the development of a range of autoimmune and inflammatory conditions under the syndrome known as Autoimmune/Inflammatory Syndrome Caused by Adjuvants, sometimes known as Breast Implant Illness.

[10] All causes of action in this proceeding relate to the Defendants' alleged liability to the Plaintiffs and the members of the proposed classes for their failures to meet the requisite standards of care in the design, manufacture, marketing and distribution of the Allergan Breast Implants in Canada, particularly with respect to their failure to warn the Plaintiffs and the Class Members adequately or at all about these alleged harms. The pleading specifically alleges that duties of care were owed to the Plaintiffs and other Primary Class Members by Allergan Inc. (and the other Defendants) and that those duties were breached, resulting in injury to the Plaintiffs and Class Members. The amended pleading also advances a cause of action based on alleged violations of consumer protection legislation.

[11] The class is clearly defined and identifiable. It more than satisfies the minimal criteria of two or more persons as provided in section 5(1)(b) of the *CPA*.

[12] The common issues listed above are, as indicated, consented to by Allergan Inc. They each fit the criteria set out in section 5(1)(c) of the *CPA* as being common to all of the class members. Counsel for Allergan Inc. emphasized at the hearing that his client's consent to these common issues is not an acceptance of liability, but rather simply indicates that Allergan Inc. agrees that the listed issues meet the requirement of commonality among the Class Members.

[13] The proposed Classes and common issues are supported by the pleadings and the record before me contains evidence which provides some basis in fact for the claims therein.

[14] The originally named Plaintiffs, as well as the newly added Plaintiffs, are capable of fairly and adequately representing the Classes. All three proposed representatives for the Primary Class are members of that class and the Plaintiff, Yeghia Kibalian, is a member of the Family Class. Each has their own causes of action that are common with those of the other putative members of their respective classes. Counsel confirms in their factum that the Plaintiffs have all actively sought out counsel to pursue this class action and there is nothing in the record to suggest that any of them has any interest in conflict with the interests of other Class Members.

[15] Finally, I see no reason why a class proceeding is not the preferable procedure for this claim. Moreover, this consent process furthers the purposes of the *CPA* related to efficiency and judicial economy, which itself weighs in favour of this being the preferable procedure for this component of the proceeding.

[16] The Statement of Claim is hereby amended and partial certification as proposed by the Plaintiff and consented to by Allergan Inc. is granted. There will be an Order to go as submitted by counsel for the Plaintiffs and consented to by counsel for the Defendants on behalf of Allergan Inc.

[17] The balance of the certification motion for this action is adjourned to September 28, 29, and 30, 2022. I am seized.

A handwritten signature in blue ink, appearing to read "Morgan J.", is centered on a light blue rectangular background.

Date: March 23, 2022

Morgan J.