

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE JUSTICE CULLITY) WEDNESDAY, THE 5TH
)
) DAY OF SEPTEMBER, 2007

B E T W E E N:

KATHRYN ANNE TAYLOR

Plaintiff

- and -

THE ATTORNEY GENERAL FOR CANADA

Defendant

- and -

**UNIVERSITY HEALTH NETWORK
(formerly Toronto General Hospital)
and DR. W. DOBROVOLSKY**

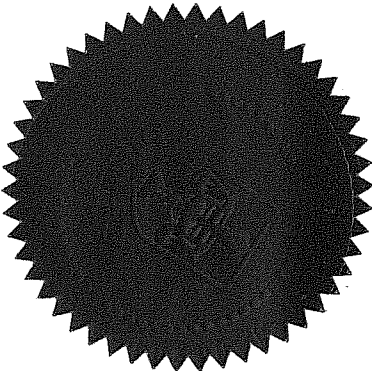
Third Parties

O R D E R

THIS MOTION, made by the Plaintiff for certification, was heard on July 23, 24, and 25, 2007, at the Court House, at 361 University Avenue, Toronto, Ontario, judgment having been reserved until this day.

ON READING the Motion Record, Reply Motion Record, Supplementary Motion Record, Factum, Reply Factum, Histories of the Medical Device Statutes and Regulations, and Books of Authorities of the Plaintiff, and the Motion Record, Factum, and Books of Authorities of the Attorney General of Canada filed herein, and

ON HEARING the submissions of counsel for the Plaintiff, the Defendant and the Ontario Health Insurance Plan, and for written reasons delivered this day, no one appearing for the Third Parties,



1. THIS COURT ORDERS that this action be and hereby is certified as a class proceeding subject to amendments to be made to the litigation plan with approval to be obtained and dealt with at a case conference.

2. THIS COURT ORDERS that this action be and hereby is certified on behalf of the following class (collectively “the Class Members”)

All persons resident in Canada, except those residing in British Columbia or Quebec who were implanted from 1983 to the present with temporomandibular joint medical device(s) of the Vitek or Proplast type, variously known as Vitek or Vitek Proplast or Proplast or Proplast 1 or Proplast 2 (“Vitek TMJ”) implants, which include but are not limited to the following:

- (i) alloplastic implants of the Proplast proprietary type including implant sheathing, block Proplast, Proplast interpositional implants, and Proplast partial total joint replacements;
- (ii) Vitek alloplastic implants, being composite of various materials; and
- (iii) alloplastic implants of the Vitek proprietary type including Vitek implant sheeting, block Vitek, Vitek interpositional implants, and Vitek partial total joint replacements.

3. THIS COURT ORDERS that Kathryn Anne Taylor is hereby appointed as the representative plaintiff for the Class.

4. THIS COURT ORDERS that the nature of the claims asserted on behalf of the Class are for:

- (a) negligence in the regulation of Vitek TMJ implants;
- (b) negligence in the failure to warn Class Members of the risks of exposure to a variety of serious medical conditions and diseases as a direct result of the faulty Vitek TMJ implants; and
- (c) damages.

5. THIS COURT ORDERS that the Class seeks the following relief
- (a) a mandatory order, or declaration pursuant to s. 24 of the *Canadian Charter of Rights and Freedoms*, requiring Her Majesty the Queen in right of Canada to provide and/or fund remediation and rehabilitative facilities within Canada for the Plaintiff, on such terms as this Honourable Court deems to be fit and just;
 - (b) a mandatory order, or declaration pursuant to s. 24 of the *Canadian Charter of Rights and Freedoms*, requiring Her Majesty the Queen in right of Canada to establish and fund a system for the proper regulation of anthropogenic temporomandibular joint devices in Canada;
 - (c) general damages (for each) of \$ 300,000;
 - (d) special damages (for each) of \$ 3,000,000;
 - (e) aggravated damages (for each) of \$1,000,000;
 - (f) punitive and exemplary damages for the class globally in such amounts and on such terms as this Honourable Court deems just; and
 - (g) pre-judgment interest on the foregoing sums pursuant to section 128 of the *Courts of Justice Act*, R.S.O. 1990, chap. C-43, as amended.

6. THIS COURT ORDERS that the following issues be and hereby are certified as common issues for the Class in the class proceeding:

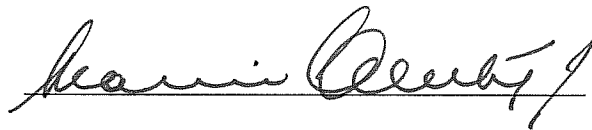
- (a) did the defendant owe a duty of care to the Class Members?
- (b) what was the appropriate standard of care?
- (c) did the defendant breach the standard of conduct/care expected of it and, if so, when and how?
- (d) what was the defendant's knowledge with respect to the safety of the Vitek TMJ implants during the relevant time period?
- (e) did the defendant have a duty to warn the Class Members of the defects and deficiencies in the Vitek TMJ implants in this proceeding?

- (f) was the defendant negligent and if so, when and how?
- (g) can the Vitek TMJ implants cause injury to the health of the implantees within the meaning of section 19 of the *Foods and Drug Act*?
- (h) did the Vitek TMJ implants materially cause or contribute to various medical complications suffered by all or any of the Class, including, but not limited to, the medical complications enumerated in the fresh as amended statement of claim?
- (i) in light of the answers to the common issues, can the court make an aggregate assessment of damages suffered by all Class Members as part of a common issues trial?
- (j) if the defendant's liability is established, did its conduct justify an award of punitive damages to the Class and if so, what amount of those damages is appropriate?
- (k) is the defendant severally liable for any and all damages caused by implantation of Vitek TMJ implants into the proposed Class Members? If so, in what amount?

7. THIS COURT ORDERS that any issues related to notice to the Class, opting out, and the deadline to opt out may be addressed at a case conference.

8. THIS COURT ORDERS that the parties shall exchange written submissions with respect to costs of the certification motion, on a mutually agreeable timetable.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:



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AS DOCUMENT NO.:
À TITRE DE DOCUMENT NO.:
PER / PAR:



**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

ORDER

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