

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Burnett v. St. Jude Medical, Inc.*,
2009 BCSC 1651

Date: 20091202
Docket: S014221
Registry: Vancouver

Between:

Elsie Burnett, as Executrix of the Estate of Earl Burnett

Plaintiff

And

St. Jude Medical, Inc. and St. Jude Medical Canada, Inc.

Defendants

Before: The Honourable Mr. Justice Sigurdson

Supplementary Reasons to: Supreme Court of B.C., January 30, 2009 (*Burnett v. St. Jude Medical, Inc.*, 2009 BCSC 82, Vancouver File No. S014221)

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.
September 30, 2009
October 1-2, 2009

Further Written Submissions of the Parties
and the Objectors:

October 26, 2009

Place and Date of Judgment:

Vancouver, B.C.
December 2, 2009

INTRODUCTION

[1] This is an application for certification of a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, and for the approval of an amended settlement made between the representative plaintiff, Elsie Burnett, and the St. Jude Medical defendants dated July 20, 2009.

[2] The proceeding relates to an allegedly defective mechanical heart valve designed, manufactured, and distributed by the St. Jude Medical defendants.

[3] The matter had earlier come on for certification and approval of a settlement but I declined to approve the settlement (Reasons dated January 30, 2009: 2009 BCSC 82, 70 C.C.E.L. (3d) 212). I would have approved the settlement in connection with the physical injuries said to have been incurred by patients as a result of the defective mechanical heart valves, in particular, increased risk of paravalvular leak within two years of implantation. However I did not approve the settlement because the possible claims for psychological injury had not, in my view, been properly investigated. At the conclusion of my reasons, I said:

[211] Although I generally find the settlement acceptable, I am not prepared to approve it on its present terms. Counsel may consider my comments and make a further application if they can agree on terms that they think will address my concerns.

[212] I recognize that settlements are not perfect, and only have to be shown to be within a range or zone of reasonableness. The aspect of the settlement that concerns me and places the settlement outside the range of reasonableness relates to the nominal compensation paid to so many class members when there is evidence of the possibility that some of them might have compensable claims for psychological injury.

...

[214] I recognize that there are significant difficulties with the psychological claims. I also appreciate that there are significant issues of causation, and that in the absence of proven psychological injury, or even with it, these claims may not be economically viable. There are serious questions about whether, based on the evidence that was filed by these objectors, the plaintiffs could satisfy the test in *Mustapha*, but on properly analyzed evidence, perhaps some might. Nevertheless, upon full consideration, which in my view has not yet taken place, some members of the class may well have suffered compensable foreseeable injury if negligence is established.

[215] I have concluded that this settlement would be reasonable to all affected if it contained some reasonable provision that those who were able to establish on medical evidence that they suffered injury to the compensable level as per *Mustapha* received some negotiated compensation. I think that this aspect must be more fully addressed by the parties. There are no doubt many ways that my concern could be addressed by the parties, but I leave that to them. The settlement can then be brought back to court if the representative plaintiff and defendants continue to agree on the terms of a settlement.

[216] Apart from my concerns about that aspect, I would have approved the settlement, as it otherwise appears to be, on all issues, a fair and reasonable settlement.

[4] My earlier reasons at paras. 124-137 describe the test applied by the court for approval of a settlement in a class proceeding and the history of this litigation, and I need not repeat those descriptions here.

[5] Eight months after the release of those reasons, the representative plaintiff brought a new application for certification and approval of a revised settlement. The application is to approve the settlement agreement as a whole.

[6] No further argument was advanced regarding the issues I determined on the last application.

[7] The relevant portion of this application relates to the resolution of the claims for psychological injury.

[8] I will set out below certain relevant paragraphs of the revised settlement agreement. In the preamble to the revised settlement agreement, the parties provided:

“On 6 and 8 to 10 October 2008, the Plaintiff sought certification of this Proceeding for the purposes of settlement and approval of the Settlement Agreement dated for reference 20 December 2007. On 30 January 2009 Mr. Justice Sigurdson released reasons for judgment in *Burnett Estate v. St. Jude Medical Inc.*, [2009] B.C.J. No. 133, denying the Plaintiff’s application. In so doing, Mr. Justice Sigurdson held he would have allowed the Plaintiff’s application had he been satisfied that the possible claims for psychological injury had been properly investigated and assessed by Plaintiff’s counsel. Counsel for the Plaintiff and the Defendants have, in consultation with their respective expert psychologists, investigated the alleged psychological injury claims. Following a mediation of their respective positions before Mr. Wally

Oppal on 13 July 2009, the Parties agreed to provide for the settlement of all such alleged claims on the basis set out hereunder and subject to approval of the British Columbia Supreme Court”.

[Amended Settlement Agreement, Paragraph C]

“The Defendants have always denied and continue to deny the allegations in the Proceeding. including any and all claims for alleged psychological injury. The Defendants further deny that the criteria set out hereunder for Psychological Injury are the appropriate criteria for compensable psychological injury claims. The Defendants have agreed to this compromise solely to avoid legal costs of defending this matter through a common issues trial and individual issue trials.”

[Amended Settlement Agreement, Paragraph D]

[9] The parties agreed on a definition for a psychological injury in the settlement agreement and established a psychological injury fund of \$50,000 to be distributed according to an attached schedule H.

“Psychological Injury”: means a diagnosable adjustment disorder with anxiety or an anxiety disorder, as defined in the Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition, Text Revision (“DSM – IV”), as a result of learning about the recall of the Silzone coated valve (and not just as a result of the implant of the valve or any other disease process). The categories of Mild Disorder Moderate Disorder and Severe Disorder are determined according to Axis V of the DSM – IV – the Global Assessment of Functioning score (“GAF Score”)– as follows: (a) greater than 60, (b) between 51 and 60, (c) less than 51 and the period of time the disorder continued, as follows: less than 6 months; from 6 months to 18 months: and for more than 18 months. Mild, Moderate and Severe Disorders are as follows:

	Disorder for less than 6 months	Disorder for 6-18 months	Disorder for more than 18 months
GAF Score greater than 60	mild	mild	Moderate
GAF Score 51-60	mild	moderate	Severe
GAF Score less than 51	severe	severe	Severe

[Amended Settlement Agreement, Definitions]

[10] According to the schedule, the fund would be distributed *pro rata* to each settlement class member meeting the criteria of mild, moderate or severe

psychological claim to a maximum of \$3,000 for a mild disorder, \$6,000 for a moderate disorder, and \$10,000 for a severe disorder, with any surplus funds being added to the settlement monies and distributed under Clause 1B of the settlement.

[11] The proponents of the settlement suggest that the requirement of proof to receive compensation for a diagnosable psychiatric disorder is lower than the standard of proof that would be applied at individual psychological injury trials. To recover under the proposed settlement, the claimant need only provide contemporaneous records, along with a statement from his or her family doctor, or a report from a psychiatrist or psychologist.

[12] The effect of the settlement was to increase the fund by \$50,000, which is the maximum amount payable for all psychological claims.

[13] The representative plaintiff and the defendants say that they have negotiated this settlement at arm's length, and that, in fact, few members of the proposed class would qualify for compensation because they would be unable to establish a psychological injury that meets both the threshold requirement of *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 and the causation requirement of *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. Proponents of the settlement say it should be approved as it is within the zone or range of reasonableness.

[14] Mr. Poyner, counsel for the representative plaintiff, deposed to engaging Dr. Brasfield, a psychiatrist, to assist in designing the claims process for psychological injury. Mr. Poyner deposed that he was not aware of any study establishing more psychological stress among recipients of Silzone heart valves than other devices, and he reviewed the opinion letters of Dr. Anderson, a psychiatrist retained by the objectors, and Dr. Smith, a psychiatrist retained by the defendants, with respect to three of the objectors who asserted psychological injuries. Mr. Poyner deposed that his firm had not received complaints of psychological harm from any possible class members others than some of the

individuals represented by Mr. Camp's firm. Mr. Camp's firm represents about 24 objectors.

[15] At the recent hearing to consider the settlement that was proposed, Mr. Poyner was cross-examined before me on his affidavit by Mr. Camp, Q.C. He had deposed that following my reasons refusing to approve the settlement, he initially thought it was appropriate that Mr. Camp's firm to take the lead in negotiating a settlement of the psychological claims, but that subsequently, he said, he found that proved fruitless. At that point, he engaged in negotiations with counsel for the defendants which, after a mediation, resulted in the proposed settlement.

[16] Mr. Poyner expressed his opinion that few if any of the putative class members would satisfy the legal test in *Mustapha*. In his opinion, the amount of \$50,000 in the amended settlement agreement for psychological claims would not likely be exceeded.

[17] The objectors represented by Mr. Camp and Mr. Mogerman say that the claims have still not been properly investigated, that in fact many class members have compensable psychological injuries, that the settlement quantum is far too low, and that the settlement agreement is collusive in the sense that it has not been the by-product of the required debate and confrontation. Mr. Camp argued that the revised settlement agreement was flawed on a procedural and substantive basis, the investigation has been inadequate, and, on the available evidence, the settlement was outside the zone or range of reasonableness. He contends that, given the circumstances, Mr. Poyner should no longer represent the plaintiffs in this proposed class proceeding.

BACKGROUND AND ISSUES

[18] I will describe generally what has taken place following my last set of reasons. In the course of this discussion, I will review whether the revised settlement from a procedural basis was reasonable and from a substantive basis was within the zone

or range of reasonableness. I will also discuss a recent and relevant decision of this Court on the recoverability of damages for psychological injury.

ANALYSIS

Procedure

[19] Following my reasons of January 30, 2009, at the request of the defendants, the objectors on March 3, 2009 sent information to the defendants about J.R., L.D., and F.B., three representative objectors who had complained about emotional and psychological consequences following the recall of the defendants' heart valve.

[20] Dr. Steven Anderson, a psychiatrist retained by the objectors, provided opinion letters with respect to F.B., L.D. and J.R. Dr. Derryck Smith, a psychiatrist retained by the defendants, provided an opinion letter on F.B. and L.D.

[21] The representative plaintiff's counsel's position is that settlement negotiations between the defendants and Mr. Camp's office had come to an end after Mr. Camp wrote and described the defendants' then existing offer as miserly and advised him that Mr. Mogerman would be devoting himself to certifying the case as a class proceeding and trying it on its merits.

[22] By this point, Mr. Poyner had received the reports of Dr. Anderson and Dr. Smith with respect to two of the objectors. Counsel for the representative plaintiff and the defendants arranged a mediation, which apparently took about five hours. It resulted in the amended settlement agreement that is now presented to the court for approval. The objectors' lawyers were not given notice of the mediation.

[23] A settlement does not need to be perfect, but it must be within a range of reasonableness. Reasonableness involves consideration of the process by which the settlement came about and a consideration of the litigation risk to the proposed class members: *Burnett v. St. Jude Medical, Inc.*, 2009 BCSC 82 at para. 135; *Sawatzky v. Société Chirurgicale Instrumentarium Inc.* (1999), 71 B.C.L.R. (3d) 51, 37 C.P.C. (4th) 163 (S.C.).

[24] Mr. Camp was critical of the approach taken by the representative plaintiff, suggesting that the evidence indicated Mr. Poyner was only concerned with the class members with physical, as opposed to psychological injuries, and that the exclusion of the objectors from the mediation suggested an intention to secure a settlement just large enough to obtain court approval.

[25] Mr. Poyner's cross-examination revealed that it was apparently his colleague Mr. Baxter, not he, who took the role of carefully considering this settlement. Although suggestions were made, which Mr. Poyner denied, that he failed to recognize that all class members were his clients, not just the ones with physical injuries, that possible inference appears largely based on Mr. Poyner's belief that the psychological claims would be extremely difficult to advance from both a legal and practical standpoint.

[26] I have concluded that Mr. Poyner honestly believed that the role of the objectors at the mediation, given the extent of their demands, would not be productive in securing a settlement. However, it was an unfortunate decision to exclude Mr. Camp's firm from the mediation given: (1) the active role that the objectors had taken in this proceeding; (2) their perspective on the psychological claims; (3) their participation in persuading the court to refuse the first settlement; and (4) the fact that they would be obviously heard by the court again on any future application to approve a settlement.

[27] Although the process in reaching this settlement was flawed, there has since the last hearing been, what previously was absent, an investigation into the extent of the possible emotional injury of representatives of the objectors, or the psychological effect of the valve recall on possible class members. I will turn to that medical evidence shortly.

Substantive Claims

[28] The issue between the parties is whether, and the extent to which, the plaintiffs could establish a psychological injury at the threshold level discussed in

Mustapha and that it was caused by the valve recall due to the defendant's alleged negligence. The causation issue, according to the defendants, is whether any emotional injury that may have been suffered was the result of the recall of the valve because of statistically increased complications over a certain period, as opposed to heart disease, heart surgery or misinformation about the risks from the defendant's valve, generally.

[29] Before dealing with the causation issue, a key area of debate between the proponents of this settlement and the objectors is whether any of the plaintiffs could meet the threshold for recovery of damages for psychological injury. Implicit in that question was whether the Supreme Court of Canada in *Mustapha* had lowered the bar for recovery of claims for psychological injury.

[30] The passage that both counsel focussed on in *Mustapha* reads (para. 9):

This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v. Smith*, at p. 189; *Linden and Feldthusen*, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal injury, and hence do not amount to damage.

[31] First let me discuss how the proposed settlement deals with possible psychological injury.

[32] Dr. Charles Brasfield, a psychiatrist, retained by Mr. Poyner's firm, opined that the psychological injury fund and its reference to an adjustment disorder – a psychological response to an identifiable stressor resulting in the development of clinically significant emotional or behavioural symptoms – was based on theories and principles most commonly followed by practicing psychiatrists and psychologists.

[33] The objectors however filed an opinion from Dr. William J. Koch, a psychologist. Dr. Koch had reviewed Dr. Brasfield's affidavit, which was sworn "with a view to formulating a realistic approach to the settlement of claims advanced on behalf of putative class members alleging psychiatric and/or psychological injury".

[34] Dr. Koch described the questions that he thought should be answered: (1) the mental health disorders or psychological problems from a patient learning that his artificial valve is defective and may fail in the future; (2) the adverse affects that these disorders or psychological problems might have on daily functioning; and (3) how one might assess such disability.

[35] Dr. Koch noted that there was "no published research ... about the psychological consequences of a failed treatment for a life-threatening illness equivalent to the current class action about artificial heart valve failure". Dr. Koch opined that mental health conditions such as depression, post traumatic stress disorder, panic disorder, and others account for substantial economic and work disability.

[36] Dr. Koch commented on Dr. Brasfield's reference to the Global Assessment of Functioning (GAF) scale. Dr. Koch expressed concerns about the use of it in assessing functional disability, particularly among individuals with anxiety or mood disorders. Dr. Koch referred to the issue of "dimensional versus categorical" diagnosis with respect to mental health problems. He said that dimensional descriptions of generalized anxiety patients predict treatment outcomes better than the strict category diagnosis of generalized anxiety disorder. His opinion was:

In conclusion, given that the population of claimants you are representing all have had significant cardiac illness in the past and all have an artificial heart valve that they fear may malfunction at some time in the indefinite future, there is a wide range of potential mental health diagnoses and sub-clinical mental health problems from which they might suffer. As well, the extent for their functional disability arising from these mental health problems will likely be quite varied and will require more detailed inquiry with each individual to ascertain if such disability exists and the extent of such disability. These claimants should have individualized assessments to determine their specific losses.

Potential mental health diagnoses that could arise following such an event include, but are not limited to, Posttraumatic Stress Disorder, Depression,

Panic Disorder, Generalized Anxiety Disorder, as well as heightened (but sub-clinical) levels of anxious and depressed mood.

[37] Dr. Koch said that while the GAF scale has been shown to be reliable in samples of the severely mentally ill, more individualized approaches to assessing mental health-related functional disability are “the more current state of the art”.

[38] Dr. Koch also opined on the fact that in the vicinity of fifty percent of individuals with mood and anxiety disorders do not present for treatment and the delay in seeking treatment for anxiety disorders frequently exceeds seven years.

[39] Dr. Smith, retained by the defendants, filed a further affidavit stating that psychiatric assessment using DSM-IV axes I-IV, which includes a Global Assessment of Functioning (GAF) score, is “the” standard practice for clinical psychiatrists in Canada and the U.S. and in many other countries which conduct such assessments. He said that many of the tests suggested by Dr. Koch did not have any validity index by which exaggerated or false claims of psychological distress can be screened out. Dr. Smith opined that the definition of psychological injury in the proposed amended settlement agreement is consistent with “the accepted standard for practice psychiatric assessment”, and the definition can provide an “objective assessment of psychological injury, if any, that was suffered by a person implanted with a Silzone valve learning about the recall of the valve”.

[40] Since I heard argument, Justice Joyce handed down his decision in *Kotai v. Queen of the North (Ship)*, 2009 BCSC 1405, where he considered *Mustapha* and whether psychological claims in a class proceeding relating to the sinking of the Queen of the North were recoverable. He carefully analyzed whether *Mustapha* lowered the bar for recovery of psychological claims and also considered the quantum of damages for six people in mini-trials.

[41] *Kotai* is a carefully considered judgment that analyzes *Mustapha*. In assessing the litigation risk faced by the parties at bar, I find *Kotai* very useful to my determination of whether this settlement is within a zone of reasonableness.

[42] Mr. Justice Joyce concluded that under *Mustapha* a plaintiff must still demonstrate that he or she suffered a recognizable psychiatric illness:

[58] Thus, despite the attempts to lower the barrier, I am satisfied that in British Columbia, at least up to the point of *Mustapha, supra*, a plaintiff who asserted a claim for damages for psychological injury in a “nervous shock” case had to meet the threshold test of establishing a recognizable psychiatric illness. While the threshold has been criticized and may be difficult to defend on principle, it appears to be one of the control mechanisms that have been employed to maintain what is perceived to be a fair balance between plaintiffs and defendants. The question then is whether *Mustapha* suggests or requires that the test should be otherwise.

[59] In *Mustapha*, there was no issue whether the plaintiff’s psychological injury was in fact the sort that could found a cause of action. The medical evidence proved that Mr. Mustapha developed a recognizable psychiatric/psychological illness, namely a major depressive disorder with associated phobia and anxiety. Mr. Hanson, counsel for the plaintiffs, submits, however, that the court put forward a different and less stringent test as to the kind or degree of damages that will be compensable at law provided the other elements are satisfied. In making that submission, Mr. Hanson focuses on the following words of McLachlin C.J.C. at para. 9 and her lack of any direct mention of the phrase “recognizable psychiatric illness”:

I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. ... Quite simply, minor and transient upsets do not constitute personal injury, and hence do not amount to damage.

[60] Mr. Wharton, counsel for the defendant, submits that the Court was not intending to posit a test that was different from that which the courts in many jurisdictions, including Canada, have applied since *Hinz v. Berry, supra*. Mr. Wharton submits that the Chief Justice’s words reflect that test and merely state the same test in different words. Mr. Wharton points out that while the Chief Justice did not use the words “recognizable psychiatric illness”, she stated that “personal injury at law connotes serious trauma or illness” and cited, with apparent approval, particular portions of *Hinz v. Berry, supra*; *Page v. Smith*, [1996] 1 A.C. 155 (H.L.); and Allen Linden, and Bruce Feldthusen, *Canadian Tort Law*. 8th ed. (Markham, Ont.: LexisNexis Butterworths, 2006), in which the test is stated to be a “recognizable psychiatric illness”.

[61] Thus, in *Hinz v. Berry*, at 42:

Damages are, however, recoverable for nervous shock, or, to put it in medical terms, for any recognizable psychiatric illness caused by the breach of duty by the defendant.

[62] And in *Page v. Smith*, at 189:

Shock by itself is not the subject of compensation, any more than fear or grief or any other human emotion occasioned by the defendant's negligent conduct. It is only when shock is followed by recognizable psychiatric illness that the defendant may be held liable.

[63] And in *Canadian Tort Law*, at 425-26:

To this day the courts steadfastly refuse to allow tort damages for every emotional upset and insist upon some physical symptoms like a heart attack or a miscarriage or some "recognizable psychiatric illness", like schizophrenia or morbid depression. [References omitted.]

[64] In the end, I am not able to conclude that the Court in *Mustapha, supra*, intended to change the law with respect to the threshold level of psychological or psychiatric injury that is required in order to be compensable where the psychiatric or psychological injury is caused by exposure, whether direct or indirect, to a shocking or frightening incident caused by the defendant's negligence. I am not satisfied that *Mustapha* has the effect of overturning *Graham v. MacMillan, supra*, which remains the law in this province in my opinion.

[65] It is important to remember that in *Mustapha* the question of a threshold for damages was not an issue that had to be decided. It was clear that Mr. Mustapha suffered a psychiatric illness. I would expect that if McLachlin C.J.C. had intended to change the law with regard to the long-standing "psychiatric illness" test she would have addressed the issue more directly, would have expressly rejected that test and would have provided reasons for doing so.

[66] In my view, it is not for me to cast aside binding authority of our Court of Appeal and formulate a new test for the degree of psychological disturbance that is compensable.

[67] Furthermore, the proposed new test of "serious and prolonged" or something more than "minor and transient" would not, in my view, provide a particularly helpful benchmark for the court, lawyers or litigants. How would the court measure and decide what is "serious"? Would the seriousness of the psychological disturbance be measured by reference to its impact on the emotional state or feelings of the plaintiff, a very subjective matter, or by reference to the effect of the disturbance on the plaintiff's ability to pursue his or her usual activities, or by reference to other factors or by some combination of factors?

[68] The requirement that the plaintiff must prove that he or she suffered a recognizable psychiatric illness introduces a degree of objectivity and certainty to the law through the mechanism of expert medical evidence. PTSD is a psychiatric illness that is often alleged to result from exposure to frightening or shocking events. A medical expert will assess the patient with reference to the diagnostic criteria established by the medical community that must be present to make a diagnosis. These criteria require the medical specialist to consider the persistence of symptoms and their impairment of

social and occupational impairment. The court is thereby provided with evidence that enable it to judge the seriousness of the disturbance and its longevity.

[69] Accordingly, I conclude that there remains a requirement that the claimants prove not just psychological disturbance or upset as a result of the defendant's negligence but also that their psychological disturbance rises to the level of a recognizable psychiatric illness.

[43] There is, I find, merit to the representative plaintiff's contention that to establish a compensable recoverable psychological injury, absent physical injury, the evidence must show that the emotional reaction rises to a recognizable psychiatric illness. *Kotai* also supports the position taken by the defendants and the representative plaintiff that the plaintiffs can only recover for the amount by which their psychological condition was made worse by learning of the valve recall. The objectors contend that the *Kotai* analysis contributes nothing new to the causation issue.

[44] In assessing the proposed settlement, I take into consideration that *Kotai* may be appealed, but it is persuasive authority that the general approach of the representative plaintiff and defendants with respect to the threshold to prove a compensable psychological injury in the settlement has merit.

[45] The objectors' argue that *Kotai* was wrongly decided, and, in any event, only applies to nervous shock cases, not this type of case. I have considered Mr. Mogerman's argument that having an implanted defective valve is distinguishable from nervous shock from a traumatic event. He argues that an ongoing prolonged fear caused by a defective product would satisfy the *Mustapha* test.

[46] In determining the reasonableness of a proposed settlement, I find that the proponents' approach to recoverable psychological injury in the absence of physical injury is more in line with *Mustapha*. That is not to say that there are not questions about the scope of *Mustapha* in these particular circumstances, but the approach taken by the supporters of the settlement is reasonable and likely correct.

Quantum

[47] I turn now to the question of the quantum of compensation under the settlement. I have set out above the agreed compensation table which is based on the duration and degree of the psychiatric disorder; the settlement is subject to a cap of \$50,000.

[48] Let me describe the evidence regarding the alleged psychological injuries suffered by objectors who were implanted with the defendant's heart valve. I do so with a view to assessing whether the evidence shows a likelihood that the objectors could prove a psychological injury and, if so, whether the quantum of the proposed settlement is within a range of reasonableness.

[49] I reviewed the affidavits of the objectors put forward as examples of people suffering compensable psychological injury (J.R. L.D. and F.B. as well as affidavits sworn by K.D., A.J., G.B., and L.B. that I referred to in my earlier Reasons). As I noted, since the matter was last before me, expert reports were provided by Dr. Anderson, a psychiatrist, with respect to J.R., F.B. and L.D., as well as reports from Dr. Smith, a psychiatrist, about the latter two, L.D. and F.B.

[50] Dr. Anderson assessed L.D.:

Mr. [L.D.] was significantly traumatized emotionally by learning of the valve recall. He developed anxiety symptoms, including chest pain, when he learned of the recall and he went on to develop chronic anxiety and depressive symptoms.

[51] Dr. Anderson went on to say that he is uncertain as to the extent to which L.D.'s fatigue is due to anxiety and depression versus medical factors, however both he noted cause fatigue and insomnia, and L.D. "is considering selling two of his businesses ... because of his reduced energy and drive". Dr. Anderson thought L.D. would continue to suffer anxiety and depressive symptoms on a long-term basis, and suggested cognitive behavioural therapy and anti-depressant medication.

[52] In terms of J.R., Dr. Anderson opined that she has not developed a major depressive disorder or major anxiety disorder, and that her symptoms do not warrant

a psychiatric diagnosis. He opined that her psychological injury does, however, rise above ordinary anxiety and fears, and that she has chronic anxiety and depressive symptoms.

[53] With respect to F.B., Dr. Anderson said that he has a chronic adjustment disorder with mixed anxiety and depressive mood that rises above the ordinary everyday stressors that occur for average people. He suggested that F.B. should be seen by a registered psychologist for cognitive behavioural therapy and if the counselling was in place, his anxiety and symptoms would likely decrease but not likely to pre-morbid levels.

[54] Dr. Smith performed an independent assessment and provided a medical report on F.B. and L.D. The defendants submit that Dr. Smith did not examine J.R. because Dr. Anderson did not find there to be a psychiatric disorder.

[55] Dr. Smith was asked whether F.B. had suffered a serious prolonged psychological disturbance or psychological injury post-implant attributable to learning that the St. Jude Medical heart valve had a sewing cuff coated with Silzone and/or was recalled, as distinct, separate or in addition to from some other stressor, such as learning he had heart disease, was to be implanted with a mechanical heart valve, or receiving any misinformation (according to the defendants) from a doctor about the risks associated with the heart valve more than two years post implant.

[56] Dr. Smith said that open heart surgery is anxiety-producing for all patients. He assumed that F.B. had never been referred for assessment or treatment by a psychiatrist or psychologist, that he was diagnosed by Dr. Anderson with an adjustment disorder with mixed anxiety and depressed mood and that the investigations to date had indicated his heart valve was functioning well and was not in need of replacement.

[57] Dr. Smith went on to say that based on his assessment of the documents and his interview with F.B. and his wife, his opinion was that F.B. did not currently qualify for a psychiatric diagnosis, nor was he in need of treatment by a psychiatrist or a

psychologist, although Dr. Smith described him as somewhat anxious. He described his worry as not specific to the recall of the heart valve but that his concerns about his heart status preceded the recall of the valve. He said he could find very little evidence of impairment as F.B. was still working, had a good set of friends and a solid marriage. He said that he did not qualify for a diagnosis of an adjustment disorder as his reaction to multiple stressors is not beyond what would be expected, there is no significant evidence of impairment and it is impossible to attribute specific anxiety to his knowledge of the recall. He gave a number of reasons for that conclusion. He also noted his view that F.B. was misinformed about the current risk of maintaining the Silzone mechanical heart valve.

[58] Dr. Smith also interviewed L.D. He said he disagreed “entirely with Dr. Anderson on the matter of depression”. He said that L.D. had only a rudimentary knowledge of risks associated with the valve and had developed a theory that the real problem was that the Silzone coating on the valve would come off like Teflon from a frying pan. He said that L.D. does not present at all like a person suffering from depression, he is affable, entertaining and engaging. Although Dr. Smith said that L.D. had a fear that his heart valve would fail, he did not present prominent symptoms of anxiety and did not have difficulty sleeping. Dr. Smith mentioned that L.D. had never sought counselling or treatment for depression or anxiety.

[59] It is apparent that the medical evidence regarding these objectors is in dispute. Nevertheless, this review demonstrates that there is a serious risk that none of them may be able to establish a psychological injury to the level required for compensation at law.

[60] I have concluded that it is a reasonable inference that there are likely to be few, if any, in the proposed class who would be able to qualify for compensation under the *Mustapha* test. I do so based on all of the evidence, the information put forward by some of the objectors, the fact that complaints of psychological injury were not made to Mr. Poyner’s firm and the fact that others have apparently not come forward with complaints of psychological injury since my last decision.

[61] I must now inquire into the reasonableness of the level of compensation under the settlement agreement for those who meet its requirements. The parties were not able to provide a great number of authorities that were of much guidance in these circumstances.

[62] The comments of Joyce J. in *Kotai* regarding whether damages would be awarded to the individual plaintiffs in that case were somewhat useful to my determination of whether the settlement presented to me was reasonable. His analysis of the individual plaintiffs also illustrates some of the difficulties that individual plaintiffs who have had heart valves implanted may have in demonstrating that the negligence resulting in the recall caused their psychological injury.

[63] I set out Justice Joyce's discussion and analysis with respect to the plaintiffs in the mini-trials that were conducted before him.

[64] With respect to L.W. he concluded:

In my view, [L.W.] experienced the kind of anxieties that many people experience and endure for a period of time following a frightening event. I am not satisfied that his emotional stress, discomfort or anxiety rises to the level where they constitute a psychological injury. Dr. de Wit was of the view that [L.W.] displayed some features of PTSD but did not meet the criteria that is necessary to diagnose that psychological disorder.

Simply put, I conclude that [L.W.]'s emotional reaction falls into the category of that which "people living in society routinely, if reluctantly accept" and does not constitute a psychological injury for which the defendant must compensate him.

[65] With respect to B.D. Joyce J. said:

As a result of his testing and interviewing, Dr. Wilensky provided an Assessment dated June 30, 2008 in which he expressed the opinion that [B.D.]'s injury as a result of his experience on the "Queen of the North" on the night of the sinking meets the diagnostic criteria for PTSD under the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV-TR") published by the American Psychiatric Association. Dr. Wilensky specified [B.D.]'s symptoms as chronic, meaning that they persisted for three months or more.

It seems apparent to me from listening to the evidence that making a diagnosis of PTSD is far from an exact science. Dr. Wilensky accepts that there are limitations, including the possibility of symptom transference. Dr. Wilensky had to take all of the information that he was able to glean from

testing instruments and from his structured interview and apply his knowledge, training and expertise to arrive at a conclusion. In the end, I accept the opinion of Dr. Wilensky and find that [B.D.] has PTSD.

I also find that his experience surrounding the sinking of the “Queen of the North” is the cause of [B.D.]’s psychiatric injury. That there may be other factors that contributed to the injury does not detract from the fact, as I find it, that but for the defendant’s negligence, [B.D.] would not have suffered the psychiatric injury.

I have concluded that an award of \$12,000 would be appropriate compensation for [B.D.] by way of non-pecuniary damages.

[66] As to [L.M.] Joyce J. said:

[L.M.] had the misfortune to be a passenger on the ferry, the Queen of the North, when it sank in 2006. He was rescued without physical injury. However, it appears that he sustained a psychological injury from the traumatic event. Although his symptom picture does not currently meet all of the criteria for a diagnosis of Posttraumatic Stress Disorder, nonetheless there is evidence of distress, disruption of his employment, resultant distress of his wife and residual vulnerability. These symptoms were a direct result of his traumatic experience of the sinking of the Queen of the North on March 22, 2006.

[L.M.]’s experience with regard to the sinking of the “Queen of the North” did not cause him prolonged or significant emotional distress. The only effects appear to have been a brief period of anxiety, some minor interference with sleep for a short period of time and a heightened sense of security, including extra vigilance when using public transportation.

There was no functional impairment in [L.M.]’s work, family or other social activities.

In my view, the evidence fails to establish any compensable psychological injury.

[67] As to F.B. Joyce J. said:

Having regard to the minor nature of the physical injuries sustained by [F.B.] and taking into account the fact that damages for his psychological injury must be assessed on the basis that the defendant’s negligence has not caused the whole of his condition but has aggravated a pre-existing symptomatic condition, I assess [F.B.]’s claim at \$7,500.00.

[68] As to K.J., Joyce J. said:

As with Mr. Bolton’s claim, Mr. Hanson submits that [K.J.]’s experience during the sinking of the “Queen of the North” made a bad situation worse and aggravated his psychological problems.

Mr. Wharton submits that it has not been proven that [K.J.] suffers from any recognizable psychiatric illness and, in any event, that it has not been proven that [K.J.]'s emotional or psychological problems were caused, in fact, by the defendant's negligence. I agree.

[K.J.] reported some initial anxiety following the sinking and sought the assistance of counsellors at three visits before returning to work on May 2, 2006. [K.J.] did not seek any further counselling, which he knew was available through B.C. Ferries, until March 2007 when Dr. Kaushansky spoke to him on behalf of counsel for the plaintiffs. [K.J.] was referred to Dr. Altar but only saw him on one occasion. He did not seek any further assistance for any emotional issues until February 2008 when he went to the Northern Health Authority Clinic. A few days later he reported to Dr. Nelson that he was feeling better and wanted to return to work. [K.J.] only attended one of five planned counselling sessions with Mr. Epp.

In my opinion, other events in [K.J.]'s life, including being away from his children whom he dearly loves, financial problems, lack of work and drug and alcohol abuse, are most likely the cause of his depression and anxiety, as opposed to his experience on the "Queen of the North".

I have to conclude that [K.J.]'s claim for compensation must fail.

[69] I have also considered the authorities on quantum for psychological injury referred to at para. 190 of my previous reasons [*Fitzgerald v. Tin*, 2003 BCSC 151, 11 B.C.L.R. (4th) 375, where the court awarded \$15,000 to a plaintiff who "had a reasonable and genuine concern arising out of her fear of HIV infection" for seven months after being pricked accidentally by a hypodermic needle in a taxi and *Tsoutsoulas v. Canada (Attorney General)*, [2006] O.J. No. 1020 (S.C.J.), where the plaintiff was awarded \$25,000 after being bitten by a carrier of HIV and the period in which infection was uncertain was longer than in *Fitzgerald.*], as well as *Cardozo v. Becton, Dickinson and Co.*, 2005 BCSC 1612; and *Piresferreira v. Ayotte*, [2008] O.J. No. 5187, 72 C.C.E.L. (3d) 23 (S.C.J.).

[70] *Cardozo* was a case where a settlement was reached in a class action concerning a defective device for detecting sexually transmitted diseases. The class members each received \$400-\$500 if their test results were false positive or false negative. In that case Gropper J. noted:

[20] The settlement value was arrived at, in part, by assessing the likely value of the individual claims and by taking into account the challenges of causation and proof which would attach if the claims were pursued in the ordinary way.

[71] *Piresferreira* was a judgment rendered after a twelve day trial in a case where damages for the debilitating symptoms of post traumatic stress disorder, anxiety and depression following an assault were assessed at \$50,000. The plaintiff had previously suffered disabling symptoms of depression and anxiety that had not noticeably ameliorated over time and there was uncertainty whether she would ever return to gainful employment.

[72] Does the settlement in terms of quantum of damages fit within the zone of reasonableness? None of the cases presented to me provide particular assistance on the range of damages if an individual plaintiff is able to establish a psychological injury, but it is clear that there would be serious issues regarding causation given the fact that emotional problems may result from the fact of heart disease or the surgery itself rather than the defendants' negligence.

[73] I conclude that if a class member is shown to suffer from a psychiatric disorder caused by the negligence of the defendant, the amounts in the settlement agreement, while perhaps at the lower end of the range, are nevertheless within the range of reasonableness for payments made without the time, delay and expense of individual damage trials.

CONCLUSION

[74] The remaining and central question is one that I addressed in my last set of reasons, that is, does the settlement meet the requirement of being fair and reasonable, and in the best interests of the class as a whole?

[75] I have concluded that it does.

[76] This settlement addresses a point left unaddressed in the last proposed settlement: consideration of the recovery of damages for psychological injury.

[77] The proposed settlement is based on an interpretation of *Mustapha* that requires proof of a recognized psychiatric disorder. That appears to be a reasonable, and likely the correct, interpretation of *Mustapha* when it is applied to a

person's reaction to being informed that an implanted medical device has been recalled due to increased risk of complications.

[78] The careful analysis of the law by Justice Joyce in *Kotai* as to what is required to establish a psychological injury to the level described in *Mustapha*, though subject to appeal, is persuasive. It provides strong support that the basis for compensation under the proposed settlement agreement was well considered by the parties to the agreement and is consistent with the governing authority.

[79] I have considered carefully the submissions of the objectors. I recognize that they make an argument that the *Mustapha* test applies differently in these circumstances than in typical "nervous shock" cases. In those cases, the objectors say the psychological injury is caused by exposure to a shocking or frightening incident, as contrasted with a prolonged event, caused by a defendant's negligence. While I have taken this argument into consideration, I find the position of the supporters of the proposed settlement more persuasive.

[80] Although there is conflict in the evidence about the extent of possible psychological injuries suffered by some of the objectors, and whether or not such injuries could reach the required standard, it is arguable, and I think likely, based on Dr. Smith's evidence, that few, if any, of the objectors would have a compensable psychological injury from the recall of the valve. I think that is a reasonable conclusion based on the information I have reviewed as to the extent of the psychological claims advanced by potential class members.

[81] However, if some class members do suffer from a provable recognized psychiatric disorder, the agreement provides some compensation when supported by a letter from a psychologist or psychiatrist, or from a family doctor that is supported by contemporaneous records.

[82] It was strongly argued by the objectors that the individual amounts and the total amount of compensation were not within a range of reasonableness.

[83] Even if a psychiatric disorder could be proven to be caused by the defendants' negligence, I have concluded that, taking into account the cost and difficulty of establishing causation at individual trials, the authorities to which I have referred, the litigation risks and the delay should the parties not settle, the amounts, while probably at the lower end of the scale, are within a range of reasonableness. The increased medical risks associated with the valve, on the evidence, appear to be for a period of time that has now passed. That is a relevant consideration in determining whether this aspect of the settlement is reasonable.

[84] As the settlement has a cap on the claims for psychological injury, it must be reasonable both in terms of the payments to individuals and the total amount. Given my conclusion that few of the class members are likely to meet the standard for recovery under *Mustapha*, I find that the total settlement amount is within a reasonable range. I find this conclusion, reached by counsel for the representative plaintiff, to be a reasonable one.

[85] Earlier in these reasons, I expressed concern about the process leading to the proposed settlement. However, the fact that the objectors were ignored in the process leading up to the mediation was more a result of the representative plaintiff's counsel's assessment, however misguided, that the involvement of the objectors would thwart a potential settlement.

[86] I am satisfied, particularly after hearing Mr. Baxter's submission, that counsel of sufficient experience and ability has conducted sufficient investigations, and that there was no collusion, and there were no extraneous considerations. It is the view of the representative plaintiff's counsel that, on a litigation risk basis, the claims were not worth pursuing and could not be pursued separately, and that the settlement was in the best interests of the class. I think that on a cost/benefit analysis, the plaintiffs are well-served by accepting the settlement.

[87] The context of this litigation is important. It has gone on for many years. Although an argument to await the outcome in Ontario has been advanced, that may

not be particularly realistic in providing a resolution for the proposed members of the British Columbia class in the reasonably near future.

[88] I recognize that there are some members of the proposed class who are dissatisfied with this settlement. I appreciate the process by which it was achieved was not perfect. Nevertheless, it is practical, appears to be cost-effective, and after considering the authorities to which I have been referred, I consider the settlement to be well conceived.

[89] To summarize, taking into consideration factors such as litigation risk, the difficulty of proving a compensable psychological injury, the possible quantum if causation is proved, and the issues concerning negligence and causation, my assessment is that the settlement, notwithstanding the cap on quantum, is within a zone of reasonableness. The terms of this settlement as a whole are fair and reasonable, in the best interests of the class members as a whole, and should be approved.

[90] In my previous reasons, I found that the test for certification had been met.

“J.S. Sigurdson J.”
The Honourable Mr. Justice J.S. Sigurdson